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"Great Expectations" Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the U.S. Post-NAFTA

Eric Tucker
Osgoode Hall Law School of York University, etucker@osgoode.yorku.ca

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"GREAT EXPECTATIONS" DEFEATED?: THE TRAJECTORY OF COLLECTIVE BARGAINING REGIMES IN CANADA AND THE UNITED STATES POST-NAFTA

Eric Tucker†

I. INTRODUCTION

Ironically, the study of globalization's impact on the performance of labor markets and labor market regulation has generated a new industry that has provided work to a small army of researchers for more than a decade.[1] So it was with some trepidation that I decided to join their ranks, even if only for a short tour of duty, especially in light of the heated conflicts among these scholars who are drawn from a variety of disciplines and come with sharply divergent normative commitments.

From the beginning of the free-trade era[2] the impact of trade liberalization on labor law was hotly contested.[3] Opponents of

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† Professor of Law, Osgoode Hall Law School, York University, Canada. Scholar-in-Residence, Cleveland-Marshall College of Law, Cleveland University (2004–2005). An earlier version of this paper was delivered in February 2005 as part of the Cleveland-Marshall College of Law Employment and Labor Speaker Series. The paper was written while I was a scholar in residence at Cleveland Marshall, and I would like to take this opportunity to thank the then Dean, Steven Steinglass, my colleagues, and the staff for their warm welcome and assistance. I would also like to thank Judy Fudge, Harry Glasbeek, Leah Vosko, and the three anonymous reviewers for their helpful comments. Financial support was provided by the Social Sciences and Humanities Research Council, Grant 410-2002-1169.

1. A crude indicator of the growth of this industry can be gleaned from searches I conducted on two electronic indexes (*ASAP Academic*—an interdisciplinary index—and *the Index to Legal Periodicals and Books*) of the term "globalization and labor." From 1980 (when both indexes begin) to the end of 1989 there were 4 (1+3) such references. From 1990 to December 6, 2004 there were 1494 (508+986). I will leave it to economically-inclined readers to decide whether the shift of resources into the globalization research industry has increased aggregate welfare.

2. For the purposes of this paper, the free-trade era begins with the Canada-United States Free Trade Agreement (entered into force Jan. 1, 1989) [hereinafter CUFTA], incorporated into the North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, Dec. 17, 1992, 1994 Can. T.S. No. 2, 32 I.L.M. 289 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA]. Hereinafter I will just refer to NAFTA unless CUFTA is being discussed separately.

NAFTA (and some supporters) predicted a regulatory race to the bottom (RTB) would ensue, leading to increasingly deregulated labor markets. The result would be weaker collective bargaining laws, lower minimum standards, and a decline in the social wage. In recent years a number of scholars have examined this prediction in light of more than fifteen years' experience under CUFTA and ten under NAFTA and there seems to be a growing consensus that, contrary to those "great expectations," labor laws in North America have not been significantly weakened.[4]

This article re-examines the effects of NAFTA on collective bargaining law in Canada and the United States.[5] Its contribution to the debates comes down to two points. On the one hand, it argues that the emerging consensus understates the impact of NAFTA-style trade liberalization on the legal regulation of collective bargaining because its focus is artificially narrow. In reaching their conclusions, "new consensus" scholars have looked exclusively at changes in private sector collective bargaining legislation. This article argues that their approach produces a misleading picture of the impact of trade liberalization because it omits public sector collective bargaining and, more importantly, it fails to consider the impact of trade liberalization on the *effectiveness* of statutory collective bargaining schemes. If the focus is broadened to include public sector bargaining and labor law's effectiveness, then one finds that there has been more labor market deregulation than consensus scholars acknowledge.

On the other hand, the article accepts that, even after broadening our analytical lens, the downward trajectory of the collective bargaining regime has not been as steep as many RTB theorists predicted. It argues that the model upon which their predictions were

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3. These debates are reviewed by Brian A. Langille, *Canadian Labour Law Reform and Free Trade*, 23 OTTAWA L. REV. 581, 592–608 (1991) and George W. Adams, *The U.S.-Canada Free Trade Agreement and Collective Bargaining*, 14 CAN.-U.S. L.J. 41, 46–52 (1988).

4. For a review of the literature, see Kevin Banks, *Globalization and Labour Standards—A Second Look at the Evidence*, 29 QUEEN'S L.J. 533 (2004) (Banks challenges emerging consensus that globalization has no negative impact on labor standards). *See also* Michel Gauvin, *Labour Legislation in Canada: Major Developments and Trends, 1989-2003* (Ottawa: Labour Law Analysis, Strategic Policy and International Labour Affairs, Labour Program, Human Resources and Development Canada, Oct. 3, 2003); Parbudyal Singh, *NAFTA and Labor: A Canadian Perspective*, 23 J. LAB. RES. 433 (2002) (short review of changes in Canadian labor laws and standards largely based on secondary sources from the mid-1990s); Pierre Verge, *How Does Canadian Labour Law Fare in a Global Economy?*, 42 J. INDUS. REL. 275 (2000).

5. The restriction of my focus to collective bargaining is prudential. In principle a proper assessment of NAFTA's effects should encompass all the strands of labor market regulation, but that is too large a project for an article. My decision to exclude Mexico from this analysis was partly prudential and partly based on the fact that its very different legal traditions, labor market organizations, and institutional arrangements would greatly complicate the comparison.

based was overly structural and that a more nuanced one is needed. Such a model must better take into account a range of factors that mediate the impact of NAFTA-style trade liberalization on labor market regulation. These mediations occur at the economic level, within the collective bargaining regime itself, and in the external environment that shapes the direction of state action.

The paper is organized as follows. The remainder of the introduction addresses some preliminary and methodological issues. Part II presents and criticizes the RTB model and suggests an alternative, more nuanced model of the impact of trade liberalization on labor market regulation. Part III uses that model to explore developments in the collective bargaining regimes of Canada and the United States. Part IV offers some brief concluding observations.

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The debate over the impact of free trade agreements had both an empirical and a normative dimension. The empirical question was whether, under a free trade agreement that left each party at liberty to change its domestic labor standards (including collective bargaining laws, minimum standards laws, anti-discrimination law, workers' compensation laws, occupational health and safety laws, and unemployment insurance), labor markets would become less regulated. To greatly simplify, critics of the free trade agreements embraced the RTB hypothesis, as did some supporters.[6] Most free traders, however, rejected this hypothesis, arguing variously that the prisoners' dilemma that underpins the RTB analysis did not apply, that progressive competitiveness strategies could yield mutual gains for labor and capital, or that the positive effect of free trade on economic development would promote upward harmonization.[7]

The normative dimension of the debate was launched from the implicit premise that labor market regulation would be weakened under free trade. The question was whether that would be an undesirable outcome. Again, to greatly simplify, for free trade critics, the answer was clearly that weakened labor market regulation would

6. *See, e.g.*, Ian Robinson, *How Will the North American Free Trade Agreement Affect Worker Rights in North America?*, *in* REGIONAL INTEGRATION AND INDUSTRIAL RELATIONS IN NORTH AMERICA 105 (Maria Lorena Cook & Harry C. Katz eds., 1994).

7. For a useful survey of the competing views, see Morely Gunderson, *Harmonization of Labour Policies under Trade Liberalization*, 53 RELATIONS INDUSTRIELLES 24 (1998); Brian Langille, *Competing Conceptions of Regulatory Competition in Debates on Trade Liberalization and Labour Standards*, *in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 479 (William Bratton et al. eds., 1996).

be undesirable since it would undermine labor law's social justice objectives: worker participation and voice achieved through collective bargaining would be undermined, as would protection against low wages, long hours of work, discriminatory treatment, unhealthy and unsafe working conditions, and the risk of income disruption due to injury, illness, or unemployment. Supporters of liberalized trade and regulatory competitiveness, on the other hand, viewed the question through the lens of comparative advantage and efficiency. If competition in product markets is a good thing, then so too is competition among producers of regulatory policy. Jurisdictions may choose to have sub-optimal (e.g., unduly high) labor standards if that is the will of the electorate, but in a free-trade regime they will have to bear more of its cost (lower investment), as capital exits to jurisdictions with more favorable regulatory regimes. If the threat of capital flight induces voters in otherwise pro-regulatory jurisdictions to choose more optimal (e.g., lower) standards that give them a comparative advantage, then this is a good outcome. It is just another dimension of achieving net welfare gains through trade based on comparative advantage. Certainly right-wing think tanks that ardently support free trade routinely make the claim that high labor standards, including minimum wage laws and collective bargaining laws, negatively affect competitiveness and, therefore, should be reduced.[8]

This article focuses on the empirical dimension of the debate rather than the normative one, but it is worth noting that the normative defense of regulatory competitiveness reveals that NAFTA-style trade liberalization is appropriately understood as an "ambitious attempt to enlist external markets to obtain political ends"[9] and should be viewed as part and parcel of a larger neo-liberal political project that aims to alter the balance of power between class forces and shift the role of the state from ameliorating the dysfunctional consequences of markets through social democratic or Keynesian welfarist policies to the promotion of global competitiveness. In this way, NAFTA creates a "conditioning

8. *See, e.g.*, Jason Clemens & Mark Mullins, *Dangers in Rigid Labour Laws: Ministers Propose Prescriptive Changes to Labour Market Regulation, available at* http://www.fraserinstitute.ca/shared/readmore1.asp?sNav=ed&id=317 (critique of proposed federal labor law reforms based in part on concern about regulatory competition).

9. Daniel Drache, *Dreaming Trade or Trading Dreams: The Limits of Trade Blocs, in* INTERNATIONAL REGULATORY COMPETITION AND COORDINATION 417, 418 (William Bratton et al. eds., 1996).

framework" that is intended to influence the policy choices of citizens and government.[10]

Finally, it is difficult to make an overall assessment of the trajectory of Canadian collective bargaining law because courts have held that constitutional jurisdiction over labor and employment rests primarily with the provinces.[11] As a result, the federal government's Canada Labour Code[12] only applies to about ten percent of the labor force, while the laws of the provinces or territories govern the remaining ninety percent. In theory it is possible to construct numerical indices that reflect changes in each jurisdiction over a fifteen-year period and then arrive at a quantitative national assessment of the trajectory of Canadian labor law.[13] This article adopts a different approach based on a qualitative assessment of changes in Canada's three largest jurisdictions—Ontario, British Columbia, and Quebec—which contain among them about eighty percent of the labor force. Mention will be made of developments in other Canadian jurisdictions as appropriate. There is less of a problem with American labor law because of federal preemption in the area of private sector collective bargaining. State and local law, however, largely governs public sector collective bargaining, outside of the federal civil service.

II. MODELING NAFTA'S IMPACT

A. The Race to the Bottom Model

Figure 1 presents a model of the RTB hypothesis. Essentially, it predicts that trade liberalization's effects on the economy and on institutions will promote downward regulatory competition.

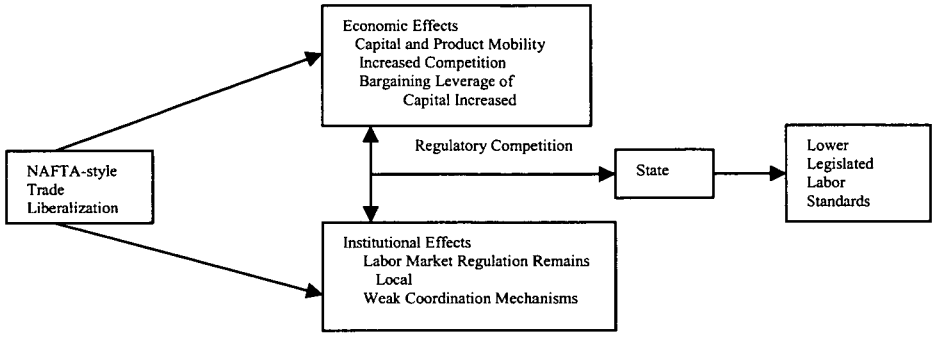
10. Ricardo Grinspun & Robert Kreklewich, *Consolidating Neoliberal Reforms: Free Trade as a Conditioning Framework*, 43 STUD. IN POLITICAL ECON. 33 (1994).

11. Toronto Elec. Comm'rs v. Snider, [1925] 2 D.L.R. 5.

12. Canada Labour Code, R.S.C. 1985, ch. L-2 (2005).

13. For an ambitious attempt to create such indices, see RICHARD N. BLOCK ET AL., LABOR STANDARDS IN THE UNITED STATES AND CANADA (W.E. Upjohn Institute for Employment Research 2003).

Figure 1
Model of the Race to the Bottom Theory



In terms of economic effects, the argument is that removing tariff and non-tariff barriers to trade and guaranteeing the security of investor rights against adverse state action increases capital and product mobility. NAFTA clearly accomplished this result (at least in principle) by phasing out remaining tariffs between the member countries and by eliminating the need for various import licenses and other non-tariff barriers. As well, it protects NAFTA investors by guaranteeing national treatment (treatment no less favorable than that given to national investors), most-favored nation status (treatment no less favorable than that given to foreign investors of a third country), and property rights against expropriation or nationalization (or measures having equivalent effect). It also creates an investor-state disputing process that permits NAFTA investors to bring complaints to an international tribunal with binding arbitration powers.[14]

The increased mobility of capital and products enhances competition between employers who are forced to continually seek ways to produce more efficiently lest a lower-cost producer displace them. Labor is one factor of production that will be affected by this intensified competitive struggle. Employers in a more competitive environment will seek to increase labor productivity by lowering unit

14. Robinson, *supra* note 6, at 106–08.

labor costs. This can be accomplished by reducing the cost of employing a given quantity of labor or by increasing the amount produced by that same quantity of labor, or, most likely, by some combination of the two (lower labor costs/higher productivity).

Because capital is mobile, it will move to jurisdictions where it can produce most efficiently. These choices will depend in part on the natural and infrastructural advantages of different locations, but governments will also adopt measures to maximize their attractiveness to existing and prospective investors. Strong, comprehensive, and well-enforced labor standards will not be attractive, as studies have shown that many employers and multinational buyers perceive that higher standards result in competitive disadvantage.[15] States that have high standards, therefore, will be pressured by employers to lower them,[16] while states that have weak labor standards will, at the very least, be disinclined to improve them, and, at worst, be driven to reduce them even further to meet the competition from states that are weakening theirs. Workers' organizations will be less able politically to resist labor market deregulation in this environment because of the greater weight of market discipline on state action. As well, their ability to organize and their economic leverage will be reduced by the threat of capital flight.[17]

This model assumes that trade liberalization occurs within a particular institutional framework, one in which regulatory authority over labor markets remains local while capital is free to move outside the regulation-producing jurisdiction. If different institutional arrangements were created to coordinate the production of labor market standards among jurisdictions, or to create a new global regulation-producing authority then the regulatory competition would end, and the market for labor market standards would cease to operate, or at least be constrained.

What, then, are the institutional arrangements made by NAFTA for labor market regulation? NAFTA itself has little to say on social matters, except in the preamble where the parties resolve to "create new employment opportunities and improve working conditions and living standards in their respective territories" and to "protect,

15. Kimberly Ann Elliot, Labor Standards, Development and CAFTA (Inst. for Int'l Econ., International Economics Policy Briefs, No. PB04-2, Mar. 2004).

16. *See, e.g.*, Guylaine Valée & Jean Charest, *Globalization and the Transformation of State Regulation of Labour: the Case of Recent Amendments to the Quebec Collective Agreement Decrees Act*, 17 INT'L J. COMP. LAB. L. & INDUS. REL. 79 (2001).

17. Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* (U.S. Trade Deficit Review Commission, Commissioned Research Paper, Sept. 6, 2000).

enhance, and enforce basic workers' rights."[18] These are not, however, enforceable obligations. For this we must turn to the North American Accord on Labor Cooperation (NAALC), [19] or labor side accord, concluded after NAFTA was signed.[20] NAALC sets out eleven guiding principles that the signatories undertake to promote, subject to each party's domestic law. The first three relate to collective action: freedom of association and protection of the right to organize; the right to bargain collectively; and the right to strike.

In addition to setting out principles, the NAALC requires each government to comply with and enforce its own labor laws. It establishes the Commission on Labor Cooperation, which is mandated to promote cooperative activities aimed at advancing the goals of the NAALC, but is not given enforcement powers. For this purpose, the NAALC requires each signatory to appoint a National Administrative Office (NAO) and provides that a complaint alleging that a country is failing to enforce its own laws can be filed with the NAO of another country. If the complaint is accepted, an investigation is conducted and if the NAO finds that the laws are not being enforced, it may request ministerial consultations. Complaints related to the three collective action principles cannot be taken further if a resolution is not reached at this stage. Complaints related to the other principles may be referred to an Evaluation Committee of Experts but only complaints regarding occupational health and safety, child labor, or minimum wages laws can go before an arbitration panel vested with power to impose penalties for non-enforcement.

As many commentators have noted, while the NAALC expresses the parties' commitment to set basic labor rights, it does not require them to provide them in law. Rather, it simply requires the parties to enforce their existing laws. In marked contrast to the trade-related provisions of NAFTA, which give investor rights priority over state sovereignty, the NAALC gives national sovereignty priority over labor rights. Each party retains the "right to establish its own

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18. NAFTA, *supra* note 2, at preamble, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=79.

19. North American Accord on Labor Cooperation [hereinafter NAALC], Sept. 13, 1993, U.S.-Mex.-Can., *available at* http://www.naalc.org/english/agreement.shtml.

20. On the background to the negotiation of the NAALC, see Kate E. Andrias, *Gender, Work, and the NAFTA Labor Side Agreement*, 37 SAN FRAN. L. REV. 521, 530–43 (2003); Rainer Dombois, Erhard Hornberger & Jens Winter, *Transnational Labor Regulation in the NAFTA—A Problem of Institutional Design? The Case of the North American Agreement on Labor Cooperation between the USA, Mexico and Canada*, 19 INT'L J. COMP. LAB. L. & INDUS. REL. 421, 425–28 (2003); JOHN R. MACARTHUR, THE SELLING OF "FREE TRADE": NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY (2000).

domestic labor standards, and to adopt or modify accordingly its labor laws and regulations."[21]

These constitutive arrangements create the conditions for regulatory competition described in Model 1: at the economic level, increased capital and product mobility generate more intense competition that gives capital greater economic leverage over labor; at the institutional level, labor standards are set nationally or sub-nationally, depending on the constitutional arrangements of each of the signatories, but not at a transnational level that coincides with the boundaries of capital and product markets. Moreover, mechanisms to encourage each jurisdiction to enhance, protect, or even enforce workers' rights are weak.

According to this model pressure will be greater on those states and jurisdictions with higher labor standards and most dependent on trade. A recent study created a quantitative index of labor standards in the United States and Canada. Not surprisingly, it found that overall Canada had higher labor standards than the United States and that the difference was particularly large in regard to collective bargaining laws.[22] Further, Canada is the most trade dependent of the OECD countries. Its exports as a percentage of gross national product in 1995 was 33.5 while that of the United States was 8. The OECD average was 23.1%.[23] As a result, this model predicts that the pressure on Canadian collective bargaining law will be particularly strong.

B. The RTB Model's Limitations

Recent literature examining the impact of liberalized trading regimes on regulation suggests that races to the bottom do not necessarily follow and that a variety of politico-economic processes contribute to regulatory outcomes.[24] Some studies have illustrated this point through an examination of an analogous situation, labor market regulation in federal states. A brief comparison of the United States and Canada, two federal states with very different

21. NAALC, *supra* note 19, at art. 2. Clyde Summers, *NAFTA's Labor Side Agreement and International Labor Standards*, 3 J. SMALL & EMERGING BUS. L. 173 (1999); Emmanuelle Mazuyer, *Labor Regulation in the North American Free Trade Area: A Study of the North American Agreement on Labor Cooperation*, 22 COMP. LAB. L. & POL'Y J. 239, 245 (2001).

22. BLOCK ET AL., *supra* note 13, at 95 (the comparison year was 1998).

23. NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS 203 (2001).

24. For example, see the essays collected in REGULATORY COMPETITION AND ECONOMIC INTEGRATION (Daniel C. Esty & Damien Geradin eds., 2001).

constitutional divisions of powers over labor and employment law, is suggestive.

In the United States, the courts held that the federal government's National Labor Relations Act substantially pre-empted state jurisdiction, thereby limiting the opportunity for regulatory competition between states to occur.[25] This was partially undone by the Taft-Hartley Act,[26] which permitted states to enact "right-to-work" laws that weakened union security. A number of states exercised this power, particularly in the southern United States. That change, in conjunction with fierce employer resistance to unionization, racism, and disunity in the labor movement resulted in low union densities in southern states. Although the spread of right to work laws slowed in the 1960s, their significance grew as employers became more aggressive in pursuing non-union production strategies. One strategy was to shift investment to greenfield sites, often located in right-to-work states. These trends intensified in the 1980s, when northern and Midwestern states lost 1.5 million manufacturing jobs and $40 billion in pay, largely to right-to-work states.[27]

Internal regulatory competition, however, cannot be invoked as the principal reason for the weakness of U.S. labor law. Barenberg emphasizes other factors, including economic competition, ineffective coordination mechanisms, and the role of local state law. Economic competition remained intense because of the extremely fragmented bargaining structure institutionalized under the NLRA and because employers were free to divest from unionized plants and reinvest in non-union ones. Coordinating mechanisms that might have overcome this fragmentation (such as peak union and employer associations, national political parties, etc.) were too weak to play this role. Finally, local elites, particularly in the south, were able to mobilize state and local power to defeat the exercise of federally guaranteed core labor rights. The result was a centralized but ineffective legal regime.[28]

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25. NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1 (1937); National Labor Relations (Wagner) Act of 1935, 29 U.S.C. §§ 151–69 (2005).

26. Labor-Management Relations (Taft Hartley) Act, 29 U.S.C. § 185 (2005).

27. MICHAEL HONEY, SOUTHERN LABOR AND BLACK CIVIL RIGHTS (1993); THOMAS A. KOCHAN, HARRY C. KATZ & ROBERT B. MCKERSIE, THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS (1994); RICK FANTASIA & KIM VOSS, HARD WORK 74–75 (2004).

28. Mark Barenberg, *Labor Federalism in the United States: Lessons for Coordinated Decentralization in Supranational Regimes*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION 111 (Daniel C. Esty & Damien Geradin eds., 2001). *See also* Bruce Elmslie & William Milberg, *Free Trade and Social Dumping: Lessons from the Regulation of Interstate Commerce*, CHALLENGE 46 (May–June 1996) (arguing that the federal Fair Labor Standards Act eliminated socially destructive regulatory competition over child labor laws) *and* Lane Kenworthy, *Economic Integration and Convergence: A Look at the U.S. States*, 80 SOC. SCI. Q.

Canada presents an interesting comparison. As mentioned, courts have held that federal jurisdiction over labor and employment is very limited, leaving regulatory authority vested in the provinces. This constitutional arrangement favors regulatory competition, since capital is fairly free to move between provinces. Yet, there has not been a race to the bottom. For example, within a few years after the federal government's industrial relations legislation was struck down in 1925, nearly all the provinces either opted into the federal scheme or created equivalent mechanisms of their own. As well, within a few years after the end of World War II, all the provinces adopted a version of the U.S. style collective bargaining law introduced by the federal government pursuant to its emergency powers.[29] Because of the apparent absence of regulatory competition, the effect of federalism on the development of Canadian labor law has received little scholarly attention. In his book *Reconcilable Differences* Paul Weiler briefly argues that the provinces have served as "laboratories for legal experimentation" that generally led to positive innovation. The reason for this, Weiler argues, is that in large provinces, like Ontario, Quebec, and British Columbia, plant location decisions are largely driven by other factors such as the availability of raw materials, transportation costs, access to markets, etc., and that variation in labor law pales by comparison.[30] To my knowledge, no one has argued that regulatory competition has exerted a significant downward influence on labor law and employment standards in Canada.[31]

The simple lesson to be learned from this brief comparison is that a regime that creates the structural conditions for regulatory competition may still have strong labor laws, while a more centralized one may not. The structural scope for regulatory competition within federal states is only one factor that determines the trajectory of labor law. The same lesson has been applied to international and regional free trade arrangements. Indeed, as noted earlier, there seems to be an emerging consensus that the structural possibilities for regulatory competition opened up by NAFTA and similar kinds of trade

858 (1999) (arguing economic integration and regulatory competition has not led to harmonization, citing the limited spread of right-to-work laws as one example).

29. JUDY FUDGE & ERIC TUCKER, LABOUR BEFORE THE LAW (2001).

30. PAUL WEILER, RECONCILABLE DIFFERENCES 11 (1980).

31. F.R. SCOTT, ESSAYS ON THE CONSTITUTION ch. 25 (1977), argued that divided jurisdiction over labor relations was undesirable because it interferes with the ability of unions to bargain collectively with employers who operated nationally. Scott did not argue that provincial jurisdiction was promoting a regulatory race to the bottom in labor standards.

agreements have not produced races to the bottom in the area of labor law.

C. *Moving the Debate Forward: Toward a Reconstructed Model of Trade Liberalization's Effect on Labor Market Regulation*

Critics of the RTB model presented in Figure 1 make a strong case that it oversimplifies the effect of NAFTA-style trade liberalization on labor law. This part of the article responds to that criticism in two ways. On the one hand, it argues that their assessment of NAFTA's impact is based on an artificially narrow focus on *private sector* labor *legislation*. Not only does this leave out public sector collective bargaining law but it also fails to consider NAFTA's impact on the *effectiveness* of the collective bargaining regime. This results in an understatement of the NAFTA effect. On the other hand, it accepts that a more nuanced, less structural model is needed that identifies and locates mediating contextual factors and that allows a greater role for agency and contingency.

1. From Private Sector Labor Legislation to the Effectiveness of Labor Market Regulation

The argument that NAFTA has not promoted a RTB is based on an examination of private sector labor legislation. While this methodology is appealing because legislative changes are relatively easy to track and assess, such an approach misses some of NAFTA's more important effects. First, it ignores developments in public sector collective bargaining legislation, presumably on the assumption, unstated in the literature, that these are unrelated to globalization. This assumption, however, is problematic. A number of commentators have pointed to links between globalization and government fiscal and tax policies, reductions in government services, and privatization, all major causes of the harsher public-sector collective bargaining climate that has led to legislative retrenchment.[32] Belman et al. expressly spell out these links.

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32. Joseph B. Rose, Gary N. Chaison & Enrique de la Garza, *A Comparative Analysis of Public Sector Restructuring in the U.S., Canada, Mexico, and the Caribbean*, 21 J. LAB. STUD. 601 (2000) (increased global competition, trade liberalization, and deregulation exerting tremendous pressure on public sector); Gene Swimmer, *Public-Sector Labour Relations in an Era of Restraint and Restructuring: An Overview*, *in* PUBLIC-SECTOR LABOUR RELATIONS IN AN ERA OF RESTRAINT AND RESTRUCTURING 1, 8 (Gene Swimmer ed., 2001) (governments in a globalized economy fear tax increases and regulation will make them unattractive to capital).

> With greater global competition and reduced tariff barriers it is easier for capital to flow into countries with low taxes and few regulations and to export into high-cost countries. Governments are under increased pressure to compete for business investment and the associated jobs, and this interjurisdictional competition may occur in the form of tax reductions and reduced regulations. The tax reductions directly affect the public sector budget constraints and employment relations, especially given the importance of labor cost in the provision of many public services. Reduced regulation indirectly reduces the demand for government services, since such regulation was often provided through the public sector.[33]

It is also important to emphasize that in both Canada and the United States, collective bargaining is primarily used to establish terms and conditions of employment in the public sector. Union density in the private sector has dropped below twenty percent in Canada and nine percent in the United States, while public sector union density is about seventy-five percent in Canada and thirty-seven percent in the United States.[34]

Second, by focusing exclusively on legislative change, researchers fail to consider the impact of trade liberalization on the *effectiveness* of labor market regulation. The reasons why we ought to be concerned with regulatory effectiveness are fairly obvious. Decades of law and society scholarship have emphasized that there is often a huge gap between law on the books and the law in action. While law on the books may have a certain expressive or symbolic value, if it fails instrumentally to achieve its objectives then there has been regulatory failure and the putative beneficiaries of the law are deprived of its promise. In short, we get a very distorted view of reality if we rely solely on legislative change as a measure of the impact of trade liberalization on labor regulation.[35]

Changes in the effectiveness of labor market regulation can come about in a number of ways other than by direct legislative

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33. Dale Belman, Morley Gunderson & Douglas Hyatt, *Public Sector Employment Relations in Transition*, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 4–5 (Dale Belman et al. eds., 1996).

34. Andrew Jackson & Sylvain Schetagne, *Solidarity Forever? An Analysis of Changes in Union Density* 14 (Ottawa Canadian Labour Congress Research Paper #24, July 2003), *available at* http://canadianlabour.ca/updir/solforeverEn.pdf. For the United States, *see* U.S. Census Bureau, *Statistical Abstract of the United States* tbl. 638 (2004–05).

35. David Weil, *Implementing Employment Regulation: Insights on the Determinants of Regulatory Performance*, *in* GOVERNMENT REGULATION OF THE EMPLOYMENT RELATION 429 (Bruce E. Kaufman ed., 1997); Stephanie Bernstein et al., *Precarious Employment and Law's Flaw's: Identifying Regulatory Failure and Securing Effective Protection for Workers*, *in* PRECARIOUS EMPLOYMENT: UNDERSTANDING LABOUR MARKET INSECURITY IN CANADA (Leah Vosko, ed., forthcoming 2005) [hereinafter PRECARIOUS EMPLOYMENT].

deregulation. Inaction in the face of a rapidly changing labor market has been characterized as passive deregulation.[36] This is particularly salient in the context of trade liberalization, which has prompted employers to pursue a variety of flexibilization strategies that have transformed labor markets.[37] For example, a structural mismatch has developed between schemes of labor market regulation based on the standard employment relationship and the growth of precarious employment.[38] Similarly, a central premise of Canadian and U.S. labor law is that collective bargaining should occur at the enterprise level. This arrangement has always presented a challenge for unions outside oligopolistic sectors of the economy, but under trade liberalization coordination problems have increased and pattern bargaining has broken down, resulting in greater wage competition and poorer collective bargaining outcomes.[39] Legislative inaction in these circumstances is properly considered a form of passive deregulation.

The effectiveness of labor market regulation may also be reduced by judicial and administrative action, which is much less visible than legislative change but potentially just as significant. The power of agencies, tribunals, and courts to interpret legislation can greatly affect its effectiveness. For example, a narrower interpretation of the term "employee" would significantly reduce labor law's coverage.[40]

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36. KERRY RITTICH, VULNERABILITY AT WORK: LEGAL AND POLICY ISSUES IN THE NEW ECONOMY 24–30 (2004).

37. For a small sampling of the literature on labor market effects, see LORI KLETZER, IMPORTS, EXPORTS, AND JOBS: WHAT DOES TRADE MEAN FOR EMPLOYMENT AND JOB LOSS? (2002); ROBERT SCOTT, THE HIGH COST OF 'FREE' TRADE (2003); LESSONS FROM NAFTA: THE HIGH COST OF FREE TRADE (2003); BRUCE CAMPBELL ET AL., PULLING APART: THE DETERIORATION OF EMPLOYMENT AND INCOME IN NORTH AMERICA UNDER FREE TRADE (1999); Noel Gaston & Daniel Trefler, *The Labour Market Consequences of the Canada-U.S. Free Trade Agreement*, 30 CAN. J. ECON. 18 (1997).

38. On the growth of "non"-standard employment and the resulting labor regulation difficulties, see *Special Issue on Changing Contours of Employment and New Modes of Labour Regulation*, 42 BRIT. J. INDUS. REL. 593 (2004); PRECARIOUS EMPLOYMENT, *supra* note 35; KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS (2004); Judy Fudge & Leah Vosko, *Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law*, 22 ECON. & INDUS. DEMOCRACY 271 (2001).

39. On the issue of decentralized bargaining, see Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. REL. REV. 3 (1992); Anne Forrest, *Bargaining Units and Bargaining Power*, 41 RELATIONS INDUSTRIELLES 840 (1986); Judy Fudge, *The Gendered Dimension of Labour Law: Why Women Need Inclusive Unionism and Broader-based Bargaining*, *in* WOMEN CHALLENGING UNIONS: FEMINISM, DEMOCRACY, AND MILITANCY 231 (Linda Briskin & Pat McDermott eds., 1993). On the problem of fragmentation under globalization, see Joseph B. Rose & Gary N. Chaison, *Unionism in Canada and the United States in the 21st Century*, 56 RELATIONS INDUSTRIELLES 34, 44–49 (2001).

40. JUDY FUDGE, ERIC TUCKER & LEAH VOSKO, THE LEGAL CONCEPT OF EMPLOYMENT: MARGINALIZING WORKERS (2002); MARC LINDER, THE EMPLOYMENT RELATION IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE (1989).

Administrative deregulation can also occur through the enforcement process. For example, strong occupational health and safety laws can be rendered ineffective without legislative change by reducing the enforcement budget or relying exclusively on persuasion to enforce the law, even after it has failed to alter an employer's behavior.[41] The NAALC's focus on non-enforcement treats this method of hidden deregulation as illegitimate. Finally, changes in the labor market that deter employees from exercising or asserting their legal rights also impair the regime's effectiveness. Fear of retaliation or concern that an employer will simply close up shop if forced to comply with the law is a powerful disincentive for employees, whether they are contemplating joining a union, complaining about illegally low wages, or calling a health and safety inspector.[42]

2. Bringing in Contextual Factors

In modeling the impact of NAFTA on labor regulation, it is useful to identify two levels of determination: the structural and the political-economic. This article already argued that NAFTA is intended to establish a conditioning framework within which capital, labor, and government operate. Model 1 captures this structural level of determination, but even after a set of constitutive decisions has been made there are many mediating factors that will influence regulatory outcomes. For example, Gunderson hypothesizes that for trade liberalization to promote downward harmonization four linkages must exist: 1) the laws in question must be enforced; 2) the laws must lead to an actual or perceived increase in labor costs to employers; 3) higher labor costs deter investment and influence plant location; and, 4) jurisdictions must compete for investment on the basis of reducing costly labor laws.[43] This is a useful beginning, but this article elaborates a more general model that identifies three sets of mediating variables involving: economic complexity; internal adaptation in the collective bargaining scheme; and the external

41. Bob Hepple, *Enforcement: The Law and Politics of Cooperation and Compliance*, *in* SOCIAL AND LABOUR RIGHTS IN A GLOBAL CONTEXT 238 (Bob Hepple ed., 2002); NEIL GUNNINGHAM & RICHARD JOHNSTONE, REGULATING WORKPLACE SAFETY: SYSTEMS AND SANCTIONS (1999).

42. *See, e.g.*, RICHARD KAZIS & RICHARD L. GROSSMAN, FEAR AT WORK: JOB BLACKMAIL, LABOR, AND THE ENVIRONMENT (1992).

43. Gunderson, *supra* note 7, at 24.

political, legal, ideological, and social environment that shapes government policy.[44]

There are three disputes in the economics literature that potentially complicate the relationship between trade liberalization and labor law. The first is a dispute over the magnitude of the changes in world trade that are associated with globalization and trade liberalization. For example, Fligstein shows that as a percentage of world GDP, world trade grew steadily from 1953 until it peaked in 1981, but that over the next sixteen years it fluctuated. He concludes that from a long-term perspective world trade is not overwhelming national economies.[45] It is, however, undoubtedly the case that since the beginning of the free-trade era, there has been a phenomenal growth in trade between the United States and Canada, which has more than doubled between 1985 and 2002.[46]

A second dispute is over the relative significance of labor costs in investment decisions. It has been argued that even under conditions of competition, location decisions are driven by a variety of considerations, and that while local labor costs and the strength of local labor market regulation are relevant factors, they are not necessarily the most important ones. Indeed, some studies suggest that labor standards play a relatively minor role in location decisions compared to other factors such as the availability of natural resources, transportation costs, tax considerations, and market size.[47] Other studies, however, show that higher wage costs are associated with lower employment growth in labor-intensive industries.[48]

A third dispute is over the optimality of a low-wage, low-standards economic strategy. It has been argued that lower labor standards may not be as advantageous as RTB supporters assume. For example, Kucera's study concludes that lower labor standards do not improve competitiveness and that, to the contrary, higher labor

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44. Fligstein, also criticizes globalization theorists of both the left and right who "want economic forces to be structural, inevitable, and everywhere dominating action." Instead, he offers a political-cultural approach that emphasizes the role of social and political forces. FLIGSTEIN, *supra* note 23, at 95.

45. *Id.* at 196–97. *See also* LINDA WEISS, THE MYTH OF THE POWERLESS STATE 167–76 (1999).

46. John W. Foster & John Dillon, *NAFTA in Canada: The Era of a Supra-Constitution*, *in* LESSONS FROM NAFTA: THE HIGH COST OF FREE TRADE 47 (Hemispheric Social Alliance 2003), *available at* http://www.art-us.org/docs/high%20cost%20of%20free%20trade.pdf.

47. Elliot, *supra* note 15; Mario F. Bognanno et al., *The Influence of Wages and Industrial Relations Environments on the Production Location Decisions of U.S. Multinational Corporations*, 58 INDUS. & LAB. REL. REV. 171 (2005).

48. JAMES HEINTZ, GLOBAL LABOR STANDARDS: THEIR IMPACT AND IMPLEMENTATION (2002). *See also* Banks, *supra* note 4 (arguing that competition on the basis of low labor costs and standards is much more likely in underdeveloped nations).

standards may be associated with other characteristics that make a jurisdiction attractive for investors.[49] Other studies have reached similar conclusions and argue that there is no empirical evidence to demonstrate that the low-wage, weak labor protection model of economic growth is optimal.[50]

No attempt will be made in this paper to sort out these disputes. Rather, the point is simply that NAFTA's economic effects are not as straightforward as the RTB model assumes. Thus, while labor standards are part of the mix of considerations in the calculus of location decisions, their salience is likely to depend on a number of factors that include not only the macro-economic factors identified above, but also the degree of inter-jurisdictional disparity in standards and industry- or even employer-specific production regimes. As well, it is likely that some labor standards are more related to competitiveness than others. For example, it seems plausible to assume that strong anti-discrimination laws are less likely to create or to be seen to create competitive disadvantage than laws that strictly regulate hours of work. To the extent that NAFTA's economic effects are more moderate than RTB theorists assert, the degree of economic compulsion driving a race to the bottom is reduced, leaving more room for states, firms, and unions to make strategic choices. This, in turn, marginally lessens the pressure on collective bargaining regimes and opens up spaces for political, legal, and civil society influences to operate.

A second point at which mediating factors operate is within the existing labor and employment law regime, particularly through the mechanism of internal adaptation.[51] Here it is assumed that trade liberalization and regulatory competition generate pressure on employers to increase output per unit of labor input, but that this pressure may be addressed within the existing regulatory framework. To the extent that adjustment takes place within the existing framework, labor market deregulation will be a lower priority for employers.[52]

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49. David Kucera, *The Effects of Core Labor Rights on Labor Costs and Direct Foreign Investment: Evaluation the "Conventional Wisdom"* (International Institute for Labour Studies, Decent Work Research Programme, DP/130/2001). *See also* DRUSILLA K. BROWN, INTERNATIONAL TRADE AND CORE LABOUR STANDARDS: A SURVEY OF RECENT LITERATURE (OECD, Labour Market and Social Policy, Occasional Papers, No. 43, 2000).

50. See studies discussed in FLIGSTEIN, *supra* note 23, at 213–20.

51. Harry J. Glasbeek, *Labour Relations Policy and Law as a Mechanism of Adjustment*, 25 OSGOODE HALL L.J. 179 (1987).

52. Passive and hidden deregulation have been discussed earlier as ways of reducing the effectiveness of labor market regulation, but they might also be considered as mechanisms of internal adaptation. It is preferable, however, to treat them as changes to the regime itself.

Internal adaptation can occur on at least two levels. At the macro-level, collective bargaining regimes historically have contained competing policy goals and visions. For some, a major goal of collective bargaining laws is to advance a version of industrial democracy in which employers and organized workers jointly determine the rules governing their relations. This vision assumes that industrial democracy is compatible with capitalism because it yields productivity increases or because competitive pressure will be alleviated by the spread of industrial democracy across the economy. For others, collective bargaining was simply an alternative mechanism for negotiating terms and conditions of employment that employees might opt into, unconnected to any broader vision of how relations of production might be made more consistent with democratic norms. The crucial point here is not which vision is preferable, but that the same statutory regime could function either as a promoter of industrial democracy or as an unadorned market mechanism depending on how it was interpreted and, more importantly, on the institutional, ideological, and political-economic environment in which it operated. Internal adaptation at the macro level would involve an attenuation of the collective bargaining regime's democratic ambitions.

A second or micro-level of internal adaptation is built into framework laws, like labor relations acts, that establish a baseline of rights and a set of procedures through which the parties establish and negotiate the substantive terms of their relationship. Such a scheme is inherently adaptive insofar as it gives each party ample leeway to pursue its objectives, leaving the outcome to be determined through bargaining. Internal adjustment to trade liberalization could take two forms. In the optimistic view, competitiveness can be pursued cooperatively and progressively, so that unions and employers can negotiate win-win arrangements that create stronger firms more able to compete in the global market, while providing workers with higher pay, more involvement, and greater job security. The alternative is the low road, where management uses its bargaining leverage to extract concessions and intensify work. In either event, adjustment occurs, although winners and losers change.[53]

The third set of mediating factors operates externally to the labor and employment law regime, potentially constraining the structural

53. For a brief review, see Anil Verma & Richard P. Chaykowski, *Employment and Employment Relations at the Crossroads*, *in* CONTRACT AND COMMITMENT: EMPLOYMENT RELATIONS IN THE NEW ECONOMY 1, 10–14 (Anil Verma & Richard P. Chaykowski eds., 1999).

pressures generated by trade liberalization. This can occur through the political system, the legal system, and civil society, and on different spatial (e.g., national, international) levels. Beginning with the political, it has been argued that nation states are a crucial site of resistance to globalization since social power is still rooted nationally. Indeed, it is through the exercise of sovereign national power that liberalized trading regimes are constructed. Thus, while these regimes may be designed with the aim of disciplining the democratic political process, it is arguably possible for workers and others who are adversely affected to mobilize nationally and successfully resist the neo-liberal project through institutionalized channels, such as participation in elections and formal lobbying.[54] Indeed, there is a large literature emphasizing that states have responded to the pressures of globalization in a variety of ways, reflecting the historical institutionalization of class and of state-market relations, often distinguishing between liberal market economies (LMEs) and coordinated market economies (CMEs).[55] Arguably, then, the race to the bottom could be thwarted or slowed because of national or sub-national political resistance to the erosion of labor standards.

Political action is not just confined to the national sphere and, indeed, the processes of globalization and trade liberalization have challenged social movements and labor organizations to develop transnational political and organizing strategies. Jeffrey Ayres has recently examined the development of what he calls "contentious transnationalism" and finds there has been an increase in institutionalized political activity, such as that facilitated by the NAALC complaints procedure, and in non-institutionalized activity, such as cross-border campaigns in the U.S.-Mexico border region.[56]

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54. Leo Panitch, *Globalization, States, and Left Strategies*, 23 SOC. JUST. 79 (1996); Jeffrey Ayres, *Power Relations under NAFTA: Reassessing the Efficacy of Contentious Transnationalism*, 74 STUD. IN POL. ECON. 101 (2004).

55. VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter Hall & David Soskice eds., 2001); GEOFFREY GARRETT, PARTISAN POLITICS IN THE GLOBAL ECONOMY (1998) (social democratic corporatism has successfully responded to the pressures of globalization and offers a viable alternative); EVELYNE HUBER & JOHN D. STEPHENS, DEVELOPMENT AND CRISIS OF THE WELFARE STATE (2001); WEISS, *supra* note 45 (globalization is firming up varieties of capitalism).

56. Ayres, *supra* note 54. *See also* David M. Trubek et al., *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187 (2005) (elements of a network are emerging but fully effective system not in place). James Atleson, *The Voyage of the* Neptune Jade*: Transnational Labour Solidarity and the Obstacles of Domestic Law*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 379 (Joanne Conaghan et al. eds., 2002) (domestic law limits the scope for transnational labor solidarity).

When we turn to legal restraints our focus is in on instruments that formally limit the power of governments to reduce labor standards. At the national level, the clearest instance would be constitutional protections of labor rights, such as freedom of association or guarantees of equality rights. The strength of this kind of constraint will obviously vary from state to state and some labor rights will be better protected than others. At the international or transnational level, there is a wide range of instruments that potentially limit state action. The International Labour Organization (ILO) has historically been the most important body engaged in the construction of an international labor rights regime through its declarations, conventions, and, most recently, its adoption in 1998 of the *Declaration on Fundamental Principles and Rights at Work*. There is a large literature assessing the ILO's effectiveness but for our purposes it is sufficient to note that the ILO's enforcement capacity is quite limited.[57] Nevertheless, the norms generated by the ILO may influence domestic legal decision-making or may support civil society opposition. Labor standards are also addressed in the NAALC, but as noted it only requires states to enforce their laws, not to establish or maintain a minimum set of labor standards. Nevertheless, the NAALC supports high labor standards in principle and promotes them through the Commission for Labor Cooperation. Thus, as in the case of the ILO, it is arguable that the NAALC influences decision-making by domestic courts and tribunals or, more generally, promotes an ideological climate that exerts a countervailing force to the pressures for lower labor standards.[58] Again, the question of the strength of these effects is an empirical one and will be examined in the context of the case study.[59]

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57. For a small sample of the literature, see Philip Alston, *"Core Labour Standards" and the Transformation of the Labour Rights Regime*, 15 EUR. J. INT'L L. 457 (2004); Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365 (1999); Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond eds., 1996); Leah Vosko, *"Decent Work": The Shifting Role of the ILO and the Struggle for Global Social Justice*, 2 GLOBAL SOC. POL'Y 19 (2002).

58. Andrias, *supra* note 20, at 521 (expressive function of NAALC); Mazuyer, *supra* note 21 (noting some indirect effects).

59. The inclusion of labor protections in multilateral or bilateral trade agreements would be another source of international law constraints. The idea has been much debated, but no action has been taken. *See, e.g.*, Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 2005 MINN. J. GLOBAL TRADE 261 (2005); Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001); Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (1999); Daniel S. Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, *in* HUMAN RIGHTS, LABOR

Finally, there may be ideological or civil society restraints on the erosion of labor standards. The idea here is that if certain norms gain popular acceptance governments and transnational corporations will be constrained in their pursuit of competitiveness-enhancing and profit-maximizing strategies. Thus, for example, Langille argues that the view that economic growth should be pursued independently of social justice and human rights is increasingly being challenged by Sen and others who argue that the promotion of human development should guide public policy.[60] If this view gains popular support, governments will face greater political opposition to labor market deregulation, particularly when it adversely affects the most vulnerable workers.

As well, the spread of a counter-hegemonic ideology may also promote the growth of strong civil society groups whose activities constrain the behavior of transnational corporations and governments.[61] Campaigns by non-governmental organizations (NGOs) and workers' rights advocacy groups to pressure transnational corporations into adopting codes of conduct governing work conditions of suppliers are the most prominent manifestation of this influence.[62] Another example is the campaign recently initiated by a consortium of AFL-CIO unions to pressure Walmart into raising wages and improving conditions, not by organizing its employees, but by mobilizing public opinion.[63] Again, the question of the extent and direction of an ideological shift, and the effectiveness of civil society campaigns is an empirical one; here we are only concerned to identify factors that may counteract pressures to reduce labor standards arising from regulatory competition in a liberalized trading regime.

RIGHTS, AND INTERNATIONAL TRADE 163–80 (Lance A. Compa & Stephen F. Diamond eds., 1996).

60. Brian A. Langille, *Seeking Post-Seattle Clarity—and Inspiration*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 137 (Joanne Conaghan et al. eds., 2002); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); Joseph Stiglitz, *Employment, Social Justice and Societal Well-Being*, 141 INT'L LAB. REV. 9 (2002).

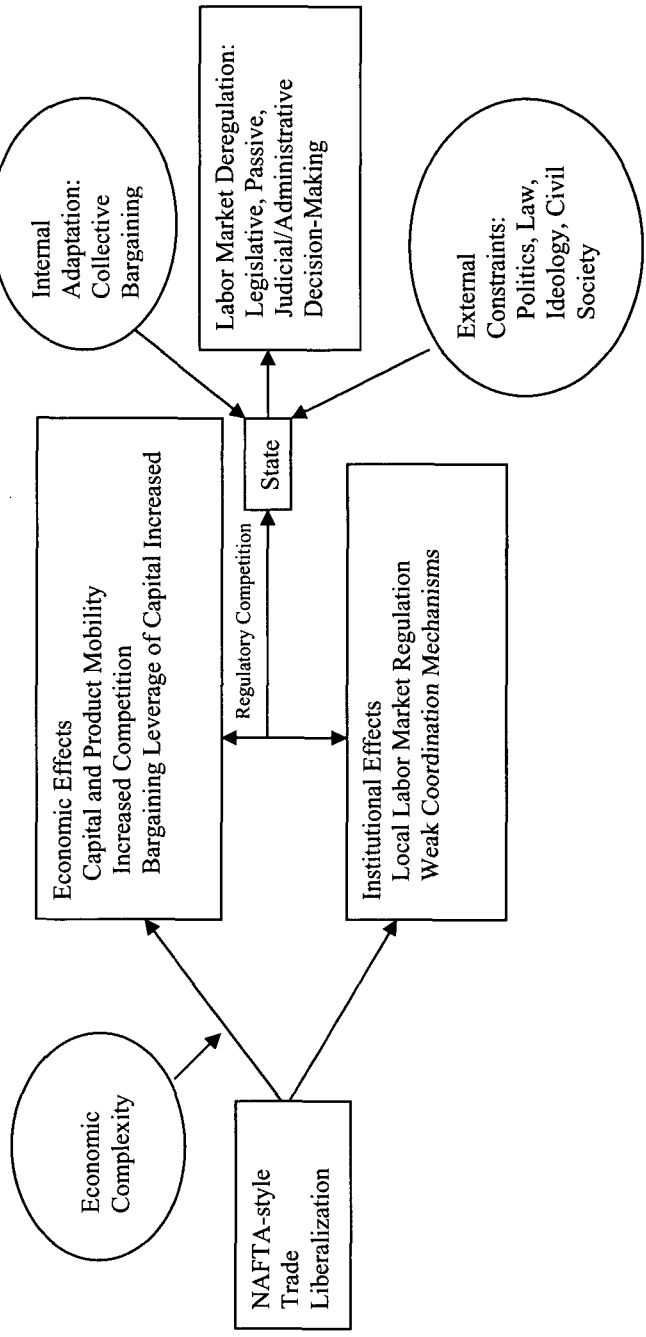
61. KIMBERLY ANN ELLIOT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? ch. 3 (2003) (referring to such activists as human rights vigilantes). *See also* Ruben J. Garcia, *Transnationalism as a Social Movement Strategy: Institutions, Actors and International Labor Standards*, 10 U.C. DAVIS J. INT'L L. & POL'Y 1 (2003).

62. The literature on corporate codes is voluminous. For a small sample, see ANDREW ROSS, LOW PAY, HIGH PROFILE: THE PUSH FOR FAIR LABOR (2004); Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (2001); Harry Arthurs, *Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION 471 (Joanne Conaghan et al. eds., 2001).

63. Steven Greenhouse, *Unions to Push for Better Pay at Walmart*, N.Y. TIMES, Dec. 11, 2004, A-16.

Thus to conclude, a more nuanced model of the effects of NAFTA-style trade liberalization on labor standards must take into account a wide range of variables. Figure 2 depicts such a model, incorporating the variables discussed above.

Figure 2
Nuanced Model of the Impact of Trade Liberalization on Labor Standards



III. CASE STUDY: COLLECTIVE BARGAINING LAW IN CANADA AND THE UNITED STATES

The following case studies of Canada and the United States each begin with an assessment of the trajectory of its collective bargaining law, followed by an examination of two of the three mediating factors, internal adaptation and external constraints. No attempt will be made to assess the economic impact of trade liberalization on collective bargaining regimes. Rather, it is assumed that while collective bargaining laws may not be the most important factor influencing investment decisions, firms do take them into account because, according to one recent survey, union members on average receive higher wages, higher union densities are associated with higher wage mark-ups, and net company profits tend to be lower in unionized firms than in non-unionized firms.[64] The implication of this starting position is that NAFTA-style trade regimes generate some structural pressure to reduce the effectiveness of collective bargaining regimes, but that there is scope for other factors to shape the actual outcome.

A. Canada

1. The Trajectory of Collective Bargaining Law

a. Legislative Change

i. Private Sector Collective Bargaining

Collective bargaining law in Ontario has been regularly amended since the enactment of the first Wagner-Act-style collective bargaining act in 1943. Prior to the free-trade era, legislative reforms followed a pattern that has been characterized as cautious and pragmatic.[65] Typically, legislation came bundled in packages that made concessions to both union and employer demands. This changed in the free-trade era, beginning with the election of the first New Democratic Party (NDP) government in 1990. Although under pressure from its union supporters, the NDP government hoped to achieve a union-management consensus on reform but, after lengthy consultations failed, it introduced Bill 40 over the vociferous objections of employers. The bill was eventually passed after

64. TOKE AIDT & ZAFIRIS TZANNATOS, UNIONS AND COLLECTIVE BARGAINING: ECONOMIC EFFECTS IN A GLOBAL ENVIRONMENT 4 (2002).

65. Joseph B. Rose, *Ontario: The Conservative Hegemony*, *in* BEYOND THE NATIONAL DIVIDE: REGIONAL DIMENSIONS OF INDUSTRIAL RELATIONS 33 (Mark Thompson et al. eds., 2003).

extended public hearings.[66] The most significant changes included expedited unfair labor practice hearings, interim reinstatement of workers fired during an organizing campaign, broader provision for first contract arbitration, better union access to employees, a partial ban on replacement workers, extended job protection during strikes, and a right to picket on some third-party property. Bill 40, however, was in force briefly. The Progressive Conservative Party (PC) won a sweeping majority in 1995 and promptly passed Bill 7 without any consultation or public hearings. Not only did it repeal the NDP reforms, but Bill 7 also rolled back earlier reforms, the most important ending the card-based system of certification.[67] This was followed by another set of amendments in 1998 that, *inter alia*, stripped the labor board of its power to order remedial certifications for serious unfair labor practices.[68] Bill 139 was passed two years later, which, *inter alia*, promoted union decertification.[69] More recently, the majority Liberal government, elected in 2003, passed its own package of labor law reforms that restored the board's power to order remedial certification and to reinstate employees terminated during an organizing campaign on an interim basis. It did not, however, restore card certification, except in construction.[70]

The history of labor law reform in British Columbia has followed a somewhat different pattern, alternating between employer-driven reforms and ones emerging from consultative processes. In 1987, prior to CUFTA, a conservative Social Credit government pushed through a set of one-sided reforms that ended card-based certification, facilitated decertification, restricted picketing and boycotts, and empowered the chair of the labor commission to intervene in trade disputes. According to the then Labour Minister, Lyall Hanson, the twin goals of the law were "cost containment and international competitiveness."[71] A majority NDP government was elected in 1991

66. Labour Relations and Employment Statute Law Amendment Act, 1992, S.O. 1992, ch. 21 (Can.).

67. Labour Relations Act, 1995 (Bill 7), S.O. 1995, ch. 1, sch. A; Felice Martinello, *Mr. Harris, Mr. Rae and Union Activity in Ontario*, 24 CAN. PUB. POL'Y 17 (2000).

68. Economic Development and Workplace Democracy Act, 1998 (Bill 31), S.O. 1998, ch. 8, known to its critics as the "Walmart Act." This was because the stripping of the power of remedial certification was a response to its exercise by the board in a decision involving an unfair labor practice complaint against Walmart for its actions during an organizing drive at its Windsor store. See United Steelworkers of America v. Walmart, [1997] OLRB Rep. 141. After extended litigation, the union eventually abandoned the bargaining rights it was awarded.

69. Labour Relation Amendment Act, 2000 (Bill 139), S.O. 2000, ch. 38.

70. An Act to amend certain statutes relating to labour relations (Bill 144), S.O. 2005, ch. 15.

71. Cited in LEO PANITCH & DONALD SWARTZ, FROM CONSENT TO COERCION 104 (3d ed., 2003).

and it established a bipartite labor-management consultation committee that produced a set of consensus recommendations, including a return to card-based certifications. The parties could not reach a consensus on three issues and the government crafted a set of compromises. It banned replacement workers, retained most of the restrictions on picketing, and declined to implement a broader-based bargaining scheme for traditionally non-union sectors. In 1998 the NDP government enacted another set of reforms, the most important of which established sectoral bargaining for the construction industry. In 2001 a right-leaning Liberal government was elected and it promptly repealed the sectoral bargaining provision and restored mandatory voting for all certifications, although it retained the ban on replacement workers.[72]

Quebec entered the free-trade era with one of the more progressive private sector collective bargaining laws, having been the first province to ban replacement workers and make dues deductions mandatory. It also had a decree law that allowed the minister of labor to extend the application of a collective agreement to all firms, union and non-union, that were in the same industrial and geographic sector. Since the free-trade era, there have been relatively few changes to the basic collective bargaining law and they have largely aimed to strengthen it. In 1994 the three-year maximum term was eliminated (except for first agreements) and in 2001 a more extensive set of amendments streamlined the administration of the labor code, better protected individual and union rights in cases of contracting out, and provided for forced ratification votes. The decree system has not fared as well. In 1996 the act was amended to require a ministerial review of all decrees prior to their renewal to determine whether the decree impairs the competitiveness of the affected industries with enterprises outside of Quebec. In the years since this change, nearly a third of all decrees were not renewed, almost all in the manufacturing sector. By 2000, 73% of manufacturing employers and 60% of manufacturing employees formerly covered by decrees were excluded.[73]

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72. Mark Thompson & Brian Bemmels, *British Columbia: The Parties Match the Mountains*, *in* BEYOND THE NATIONAL DIVIDE: REGIONAL DIMENSIONS OF INDUSTRIAL RELATIONS 97 (Mark Thompson et al. eds., 2003). On earlier legislative reforms, see Harry Arthurs, *The "Dullest Bill": Reflections on the Labour Code of British Columbia*, 9 U. B.C. L. REV. 280 (1974) and PAUL WEILER, RECONCILABLE DIFFERENCES (1980).

73. Michel Grant, *Quebec: A New Social Contract—From Confrontation to Mutual Gains?*, *in* BEYOND THE NATIONAL DIVIDE: REGIONAL DIMENSIONS OF INDUSTRIAL RELATIONS 51 (Mark Thompson et al. eds., 2003); Vallée & Charest, *supra* note 16; Gauvin, *supra* note 4.

Changes in a number of other Canadian jurisdictions reflect the unevenness observed in the three largest provinces. NDP governments in Manitoba and Saskatchewan, and the federal Liberal government have strengthened their private sector collective bargaining laws in various ways. On the other hand, there has been a shift away from card-count certifications to mandatory votes. Prior to the free-trade era only one province required votes. Since 1988 the number has increased to five (Nova Scotia, Alberta, Newfoundland and Labrador, Ontario, and British Columbia), covering about two-thirds of the labor force.[74]

Most commentators have concluded that Canadian private sector labor law has remained relatively stable in the free-trade era.[75] While I do not fundamentally disagree with these judgments, they fail to give proper weight to the most significant overall change: the declining availability of card-count certifications. Numerous studies have found that the shift from card counts to elections significantly reduces union success rates and lead to a lowering of trade union density.[76] As a result, the negative effect of this change likely outweighs the positive effect of other changes.

ii. Public Sector Collective Bargaining

The picture of legislative reforms changes dramatically if we expand our horizons to include public sector collective bargaining. Collective bargaining was only extended to the public sector in the mid-1960s and public sector union density rose rapidly, far exceeding that of the private sector. From the outset, however, governments often enacted special legislation overriding the basic public sector collective bargaining framework to end strikes and impose wage restraints. As well, essential service designations were expanded to reduce the number of workers legally permitted to strike. The use of

74. It was up to six until a newly elected NDP government in Manitoba brought back card-counts following its abolition in 1997 by the PC government then in power. Percentage calculated from Statistics Canada. Statistics Canada, Labour Force Survey (Jan. 7, 2005 release), *available at* http://www.statcan.ca/english/Subjects/Labour/LFS/lfs-en.htm.

75. Singh, *supra* note 4; Verge, *supra* note 4; Gauvin, *supra* note 4.

76. These studies are reviewed in John Goddard, *Do Labor Laws Matter? The Density Decline and Convergence Thesis Revisited*, 42 INDUS. REL. 459, 476 (2003). In addition, see Chris Riddell, *Union Certification Success under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978–1998*, 57 INDUS. & LAB. REL. REV. 493 (2004); Sara Slinn, *The Effect of Compulsory Certification Votes on Certification Applications in Ontario: An Empirical Analysis*, 10 CAN. LAB. & EMP. L.J. 399 (2003).

these devices increased in the 1980s, leading one commentator to characterize the regime as one of "permanent exceptionalism."[77]

The frequency of legislative interventions has increased in the free-trade era. Between 1991 and 1996, eleven of the fifteen governments in power relied on special legislation to extend contracts, impose wage cuts or freezes, require workers to take unpaid leave days, or override job security provisions to facilitate downsizing.[78] Since 1996, Alberta, British Columbia, Newfoundland, Nova Scotia, Quebec, Saskatchewan, and the Federal government enacted back-to-work legislation to end legal strikes by public sector workers, often imposing contracts rather than sending the dispute to binding interest arbitration. As well, provincial governments continue to impose public sector wage restraints and further limit collective bargaining rights.[79] Based on an overview of the current state of public sector collective bargaining, one commentator concluded: "Governments are not prepared to restore a genuine collective bargaining system."[80]

b. Passive and Hidden Deregulation?

Trade liberalization has spurred employers to change a range of employment practices that adversely affect the existing collective bargaining scheme's effectiveness.[81] These include the use of contingent workers and the outsourcing of work. Contingent workers are more difficult to organize because they are often less attached to the workplace and also because their employment status may be uncertain, even after the extension of the collective bargaining regime to "dependent contractors."[82] Outsourcing and the vertical

77. Leo Panitch, *Toward Permanent Exceptionalism: Coercion and Consent in Canadian Industrial Relations*, 13 LABOUR/LE TRAVAIL 133 (1984). The argument has since been expanded and updated. *See* PANITCH & SWARTZ, *supra* note 71. *See also* Joseph B. Rose, *Public Sector Bargaining: From Retrenchment to Consolidation*, 59 RELATIONS INDUSTRIELLES 271 (2004) and DANIEL DRACHE & HARRY GLASBEEK, THE CHANGING WORKPLACE ch. 9 (1992).

78. Swimmer, *supra* note 32, at 1.

79. Gene Swimmer & Tim Bartkiw, *The Future of Public Sector Collective Bargaining in Canada*, 24 J. LAB. RES. 579, 582–85 (2003); COLLECTIVE BARGAINING IN CANADA: HUMAN RIGHT OR ILLUSION? 42–63 (NUPGE & UFCW, 2005).

80. Rose, *supra* note 77, at 287. *See also* PANITCH & SWARTZ, *supra* note 71, at 183–208.

81. Morley Gunderson & Anil Verma, *Free Trade and Its Implications for Industrial Relations and Human Resource Management*, *in* REGIONAL INTEGRATION AND INDUSTRIAL RELATIONS IN NORTH AMERICA: PROCEEDINGS OF A CONFERENCE HELD AT THE NEW YORK STATE SCHOOL OF INDUSTRIAL AND LABOR RELATIONS 167, 170–72 (Maria Lorena Cook & Harry C. Katz eds., 1994).

82. Judy Fudge, Eric Tucker & Leah Vosko, *Changing Boundaries of Employment: Developing a New Platform for Labour Law*, 10 CAN. LAB. & EMP. L.J. 361 (2003); CYNTHIA CRAWFORD ET AL., SELF-EMPLOYED WORKERS ORGANIZE: UNIONS, LAW AND POLICY (2005).

disintegration of production also put a large burden on union organizing resources. Successor rights are available in a rather narrow range of circumstances so that when a unionized plant contracts work out, the union must organize the workers who are hired to perform what was previously bargaining unit work. These are not the only reasons why private sector union density has declined in Canada during the free trade era by at lest two percentage points to around eighteen percent, but they are part of the explanation.[83]

Flexibilization also has a significant impact on unions' bargaining power in the context of a scheme that only requires collective bargaining to occur on a workplace-by-workplace basis. The proliferation of small bargaining units not only increases the costs of bargaining, but also erodes union bargaining power. The result is that, outside of a few sectors where pattern bargaining has survived, unions have been unable to take wages out of competition. As well, even within unionized workplaces, there has been a significant increase in contingent employment. For example, the percentage of new employees in unionized jobs who are hired as temporary employees has grown from 19 in 1989 to 28 in 2004.[84] We will look more closely at the consequences of this development when we discuss collective bargaining itself as a mechanism of adjustment. Here it is sufficient to note that the failure to adopt broader-based bargaining schemes or other measures aimed at redressing the structural misfit between the current law governing bargaining structure and changes in the labor market should be considered a form of passive labor market deregulation.

Turning to judicial and administrative interpretation and enforcement, to my knowledge there is no evidence that these have operated as mechanisms of adjustment to trade liberalization in Canadian collective bargaining law. Canadian labor boards have not altered their interpretation of their enabling statutes during the free-trade era in a manner that has further limited the law's effectiveness. Of course, this is not to say that prior to the free-trade era labor relations boards single-mindedly pursued policies favorable to the

83. The significance of the lack of fit between collective bargaining law and the decline in trade union density is a matter of some debate. *See* John O'Grady, *Beyond the Wagner Act, What Then?*, *in* GETTING ON TRACK 153 (Daniel Drache ed., 1992) (pessimistic view of the viability of the Wagner Act model); Andrew Jackson, *Solidarity Forever? Trends in Canadian Union Density*, 74 STUD. IN POL. ECON. 125 (2004) (structural shifts in employment had limited impact on private sector union density decline).

84. René Morisette & Anick Johnson, *Are Good Jobs Disappearing in Canada* tbl. 12 (Statistics Canada, Analytical Studies Branch Research Paper Series, 11F0019MIE-No. 239), *available at* http://www.statcan.ca/cgi-bin/downpub/listpub.cgi?catno=11F0019MIE2005239.

growth and effectiveness of collective bargaining,[85] but rather that there has not been a notable departure from the compromises embedded in board jurisprudence. Indeed, on at least some occasions, labor boards have attempted to respond to the challenges posed by employer resistance to collective bargaining and flexibilization strategies.[86] In Ontario, the Conservative government threatened the independence of the labor board by changing long-standing appointment practices, but it suffered legal setbacks and other governments have not followed suit.[87] Moreover, the Supreme Court of Canada has been giving labor boards greater leeway to interpret their enabling statutes in the free-trade period than had been the case previously.[88] In short, it would be difficult to claim administrative or judicial practices changed in a manner that undermined the effectiveness of the collective bargaining scheme.

2. Contextual Mediations

a. Internal Adjustments: Bargaining

The extent to which post-World War II Canadian statutory collective bargaining schemes were ever an effective vehicle for constructing a more democratic regime of industrial citizenship is a matter of considerable debate.[89] What is significant, however, is that there is now widespread agreement that the aspirations of those who viewed the postwar collective bargaining scheme as a mechanism through which a new world of industrial citizenship could be created have been dashed. Even more to the point, globalization has been

85. For a critical assessment, see DRACHE & GLASBEEK, *supra* note 77, at 57–97.

86. For example, a number of boards have found held that Walmart's tactics for resisting unionization constitute unfair labor practices. *See, e.g.*, United Steelworkers of America v. Wal-Mart Canada, [1997] O.L.R.B. Rep. 141; Walmart Canada and UFCW, Local 1518, [2003] B.C.L.R.B.D. No. 156. The Quebec labor board has adopted a more expansive approach to successor rights. See cases cited in Ivanhoe Inc. v. UFCW, Local 500, [2001] 2 S.C.R. 565.

87. Kevin M. Burkett, *The Politicization of the Ontario Labour Relations Framework in the 1990s*, 6 CAN. LAB. & EMP. L.J. 161 (1998); Craig Flood, "*Hewat v. Ontario*," 6 CAN. LAB. & EMP. L.J. 263 (1998). The impact of these measures in Ontario has not been studied.

88. On the 1980s, see Brian Etherington, *Arbitration, Labour Boards and the Courts in the 1980s: Romance Meets Realism*, 68 CAN. BAR REV. 405 (1989). The decision in Ivanhoe Inc. v. UFCW, Local 500, [2001] 2 S.C.R. 566, is more reflective of the court's current, less interventionist practice.

89. The classic articulation of this aspiration can be found in TASK FORCE ON LABOUR RELATIONS, CANADIAN INDUSTRIAL RELATIONS FINAL REPORT ¶ 296 (Woods Task Force, 1968). *See also* Harry Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45 CAN. BAR REV. 786 (1967). For more negative assessments, LABOUR GAINS, LABOUR PAINS: 50 YEARS OF PC 1003 (Cy Gonick et al. eds., 1995) and Judy Fudge & Harry Glasbeek, *The Legacy of PC 1003*, 3 CAN. LAB. & EMP. L. J. 357 (1995).

identified as one of the crucial reasons for this failure.[90] Thus, at a macro-level, it is fair to say that the collective bargaining regime has internally adapted to the broader environment in which it operates.

Turning to the micro-level of adjustment, a number of indicators suggest that the predominant approach of employers has been to adopt forcing strategies to extract concessions at the bargaining table, rather than "high road" strategies to increase productivity through improved conditions, more participation, and greater job security.[91] With respect to wages, the union-nonunion wage differential is estimated to have shrunk from approximately 25% in the late 1970s to 8% in 1997. Major private sector wage settlements have decreased from an average of 4.8% between 1982 and 1988 to an average of 2.6% between 1989 and 2001. There has also been a breakdown of the linkage between productivity gains and wage increases. For example, between 1992 and 2002, productivity in manufacturing increased nearly 18% while real hourly wages increased by just 3.3%.[92] As well, pattern bargaining has been abandoned or disrupted in many industries. The ability of unions to protect wages and benefits and to provide their members with employment security has been limited, despite making these objectives their highest priorities.[93] Moreover, the average number of strikes per year has declined sharply from 693 between 1982 and 1988 to 409 between 1989 and 2001.[94]

The point is not that collective bargaining imposes no restraint on unionized employers—unionized employees continue to enjoy a higher level of protection than non-unionized employees—but rather that in the free-trade era employers have been able to use the bargaining process as a mechanism of adjustment to the demands of a more competitive environment and this has arguably reduced employer pressure for weaker private sector collective bargaining laws.

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90. H.W. Arthurs, *The New Economy and the New Legality: Industrial Citizenship and the Future of Labour Arbitration*, 7 CAN. LAB. & EMP. L. J. 45–63 (1999) *and* THE NEW ECONOMY AND THE DEMISE OF INDUSTRIAL CITIZENSHIP (1996).

91. Anil Verma & Richard P. Chaykowski, *Employment and Employment Relations*, *in* CONTRACT AND COMMITMENT: EMPLOYMENT RELATIONS IN THE NEW ECONOMY 12 (Anil Verma & Richard P. Chaykowski eds., 1999); Gordon Betcherman, *Workplace Change in Canada: The Broad Context*, *in* CONTRACT AND COMMITMENT: EMPLOYMENT RELATIONS IN THE NEW ECONOMY 21, 27–30 (Anil Verma & Richard P. Chaykowski eds., 1999).

92. Calucated from PANITCH & SWARTZ, *supra* note 71, at appx. I, tbl. II.

93. Rose and Chaison, *supra* note 39, at 45–47; ANDREW JACKSON, FROM LEAPS OF FAITH TO HARD LANDINGS: FIFTEEN YEARS OF "FREE TRADE" 10–11 (2003).

94. Calculated from PANITCH & SWARTZ, *supra* note 71, appx. I, tbl. III.

b. External Constraints

i. Political

Unions in Canada have a long history of political engagement that, in the post-World War II era, has principally taken the form of support for the NDP. Although the NDP has never come close to winning a federal election, it has formed provincial governments in British Columbia, Manitoba, Ontario, and Saskatchewan before and during (British Columbia 1992–2001, Manitoba 1999–present, Ontario 1990–95, Saskatchewan 1991–present) the free-trade era. During each of these periods of NDP government, private sector collective bargaining laws were modestly strengthened to meet some union demands. On the other hand, when ideologically conservative governments have been in power (Ontario 1995–2003, Alberta 1972–present, British Columbia 2001–present), private-sector collective bargaining laws have been weakened in response to employer demands. Quebec is a special case where a separatist political project has provided the foundation upon which to build a limited corporatist entente between labor and management for much of the 1990s. The election of a right-leaning Liberal government in 2003, however, may result in private sector industrial relations becoming more contentious.[95]

The political orientation of the government in power has also had a significant impact on public sector labor relations, with governments led by centrist and conservative parties being far more aggressive in their resort to unilateral legislation to constrain public sector unions and limit collective bargaining than governments led by parties with a social democratic orientation. However, even left-of-center parties have supported back-to-work legislation and other "exceptional" interventions limiting "normal" operation of public sector collective bargaining laws.[96]

ii. Legal

International labor law has not directly constrained the actions of Canadian governments bent on restricting labor rights, but it has influenced the development of national legal norms in a manner that has benefited unions. Canada ratified the first ILO convention

95. PANTITCH & SWARTZ, *supra* note 71, at 183–208; BEYOND THE NATIONAL DIVIDE, *supra* note 65.

96. Swimmer & Bartkiw, *supra* note 79, at 583; PANITCH & SWARTZ, *supra* note 71.

protecting freedom of association (No. 87) in 1972, but not the second (No. 98). It is generally accepted, though, that all members of the ILO are obliged to protect the right to freedom of association and Canada does not dispute this.[97] Yet its acceptance of this obligation in principle has not restrained governmental practice, particularly in dealing with public sector workers. Panitch and Swartz found that between 1954 and 2001, 76 complaints have been filed against Canada for violations of freedom of association, giving it the dubious distinction of having the most of all G-7 countries. Notably, 35 of these complaints were filed between 1992 and 2001.[98] Since 2001, 16 more complaints have been filed (4 in 2002, 5 in 2003, 6 in 2004, and 1 as of the end of June 2005). The ILO Committee on Freedom of Association has repeatedly noted with regret that various Canadian governments are violating workers' freedom of association and requested that the offending legislation be repealed. These findings and requests have been ignored.[99]

Turning to the NAALC, it will be recalled that its enforcement provisions aim to prevent deregulation through non-enforcement of domestic law. As such, it does not purport to operate as a constraint on direct labor market deregulation, although it could have an indirect effect. Perhaps for this reason Canadian unions have continued to funnel the overwhelming majority of their complaints through the ILO rather than through the NAALC. Two complaints have been brought against Canada under the NAALC. The first arose out of the closure of a McDonald's restaurant in Quebec, allegedly to avoid unionization. The submitters claimed that McDonald's exploited loopholes in Quebec's labor law that permits employers to delay certification proceedings and then close facilities to avoid unionization. The American NAO accepted the case for review but shortly thereafter an agreement was reached between the submitters and the Quebec government to include this issue in an ongoing review of the Quebec Labour Code. As a result, the complaint was withdrawn and the file closed. In 2001 administrative changes were

97. Leary, *supra* note 57, at 29.

98. PANITCH & SWARTZ, *supra* note 71, at 54–57, 208–09.

99. For example, see CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 Canada (ratification: 1972) (2004), *available at* http://www.ilo.org/ilolex/english/newcountryframeE.htm, (335th Report of the Committee on Freedom of Association G.B. 291/7, Geneva, Nov. 2004), ¶¶ 412–512, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/gb-7.pdf. For discussion, see Burkett et al., *Canada and the ILO*, 10 CAN. LAB. & EMP. L.J. 231 (2003); Ken Norman, *Promises and Paradoxes: ILO Freedom of Association Principles as Basic Canadian Human Rights*, 67 SASK. L. REV. 591, 604–08 (2004).

made to the Code that accelerated the certification process, but nothing was done to address plant closings to avoid unionization.[100] The second complaint was about a provision in federal legislation that deems rural route mail couriers not be employees for the purposes of collective bargaining law, depriving them of access to a statutory collective bargaining scheme. The American NAO refused to accept this complaint because it did not raise a question related to the enforcement of law. The rural route mail couriers subsequently achieved voluntary recognition after a lengthy and expensive organizing drive by the postal workers' union.[101]

Although the ILO and NAALC have had little direct effect, the norms they embrace have influenced the interpretation of domestic law. The Charter of Rights and Freedoms, which came into force in 1982, protects freedom of association but does not define its parameters. Union supporters hoped the courts would find it protected the right to bargain collectively and to strike, while opponents hoped it would be found to limit union security clauses. Initially both sides were disappointed as the Supreme Court of Canada's refused to constitutionalize labor rights in order to leave the state ample scope to craft its labor relations policy as it saw fit.[102] A recent trilogy of decisions, however, marks a bit of a shift.

In *Dunmore v. Ontario (Attorney General)*[103] the court considered a Conservative government law excluding agricultural workers from Ontario's collective bargaining statute. The law not only deprived agricultural workers of access to a statutory collective bargaining scheme, but also left them unprotected from employer retaliation for engaging in organizing activity. In earlier cases, the court had held that freedom of association is an individual right that prohibits the state from barring workers from forming associations. It did not require positive state action to protect workers from adverse action by non-governmental individuals and organizations.[104] In *Dunmore* the court moderated its earlier position in two ways. First, it recognized that freedom of association protects some collective rights. Second, it

100. Lance Compa, *NAFTA's Labour Side Agreement Five Years On: Progress and Prospects for NAALC*, 7 CAN. LAB. & EMP. L.J. 1, 22–24 (1999); personal communication with Stephanie Bernstein, Professor, Département des Sciences juridique, Université du Québec à Montréal, Jan. 13. 2005 (on file with author).

101. Compa, *supra* note 100; CRAWFORD ET AL., *supra* note 82, at 96.

102. For a discussion of these early cases, see Dianne Pothier, *Twenty Years of Labour Law and the* Charter, 40 OSGOODE HALL L.J. 369 (2002); Judy Fudge, *Labour, the New Constitution and Old Style Liberalism*, 13 QUEEN'S L.J. 61 (1988).

103. Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016.

104. Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989.

also found that freedom of association sometimes requires the state to protect particularly vulnerable workers from private-party interference. Specifically, the court held that the government of Ontario was required to protect agricultural workers against employer unfair labor practices and to provide their associations with the right to make representations to employers. This was thin constitutional protection, since it did not give agricultural workers access to an effective scheme of collective bargaining, and the then PC government responded with legislation that gave agricultural workers the bare minimum required by the court.[105]

One particularly interesting feature of *Dunmore* is that in reaching its decision the court relied on international law norms to interpret the Charter's protection of freedom of association. For example, to defend the proposition that freedom of association was not just an individual right but also a collective one, Bastarache, J., for the majority, wrote:

> The collective dimension of s. 2(*d*) is also consistent with developments in international human rights law, as indicated by the jurisprudence of the Committee of Experts on the Application of Conventions and Recommendations and the ILO Committee on Freedom of Association (see, e.g., International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (4th ed. 1996)). Not only does this jurisprudence illustrate the range of activities that may be exercised by a collectivity of employees, but the International Labour Organization has repeatedly interpreted the right to organize as a collective right (see International Labour Office, *Voices for Freedom of Association* (Labour Education 1998/3, No. 112): "freedom is not only a human right; it is also, in the present circumstances, a collective right, a public right of organisation" (address delivered by Mr. Léon Jouhaux, workers' delegate).[106]

Further on Bastarche, J. returned to international human rights law to justify the court's holding that the Charter may prevent the exclusion of vulnerable workers from legislation protecting the exercise of freedom of association.

> The notion that underinclusion can infringe freedom of association is not only implied by Canadian *Charter* jurisprudence, but is also consistent with international human rights law. Article 2 of *Convention (No. 87) concerning Freedom of Association and*

105. An Act to Protect the Rights of Agricultural Workers, S.O. 2002, c. 16. This legislation is being challenged and the court will be pressed to further constitutionalize collective bargaining rights.

106. *Dunmore*, 3 S.C.R. ¶ 16.

Protection of the Right to Organize, 67 U.N.T.S. 17, provides that "[w]orkers and employers, *without distinction whatsoever*, shall have the right to establish and . . . to join organisations of their own choosing" (emphasis added), and that only members of the armed forces and the police may be excluded (Article 9). In addition, Article 10 of Convention No. 87 defines an "organisation" as "*any* organisation of workers or of employers for furthering and defending the interests of workers or of employers" (emphasis added). Canada ratified Convention No. 87 in 1972. The Convention's broadly worded provisions confirm precisely what I have discussed above, which is that discriminatory treatment implicates not only an excluded group's dignity interest, but also its basic freedom of association. This is further confirmed by the fact that Article 2 operates not only on the basis of sex, race, nationality and other traditional grounds of discrimination, but on the basis of *any* distinction, including occupational status (see L. Swepston, "Human rights law and freedom of association: Development through ILO supervision" (1998), 137 *Int'l Lab. Rev.* 169, at pp. 179-180). Nowhere is this clearer than in Article 1 of *Convention (No. 11) concerning the Rights of Association and Combination of Agricultural Workers*, 38 U.N.T.S. 153, which obliges ratifying member states to secure to "all those engaged in agriculture" the same rights of association as to industrial workers; the convention makes no distinction as to the type of agricultural work performed. Although provincial jurisdiction has prevented Canada from ratifying Convention No. 11, together these conventions provide a normative foundation for prohibiting *any* form of discrimination in the protection of trade union freedoms (see J. Hodges-Aeberhard, "The right to organise in Article 2 of Convention No. 87: What is meant by workers 'without distinction whatsoever'?" (1989), 128 *Int'l Lab. Rev.* 177). This foundation is fortified by *Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development* (*I.L.O. Official Bulletin*, vol. LVIII, 1975, Series A, No. 1, p. 28) which extends, under Article 2, the freedom to organize to "any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or, . . . as a tenant, sharecropper or small owner-occupier."[107]

This decision illustrates that, not withstanding its weak enforceability, "soft" international law may influence the development of "hard" domestic constitutional law.[108]

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107. *Id.* ¶ 27 (emphasis in original).

108. For discussions of *Dunmore*, see the symposium in 10 CAN. LAB. & EMP. L.J. (2003); Judy Fudge, *"Labour is Not a Commodity": The Supreme Court of Canada and Freedom of Association*, 67 SASK. L. REV. 425 (2004); Jamie B. Cameron, *The "Second Labour Trilogy"*, 16 SUP. CT. L. REV. (CAN.) (2d Series) 67 (2002). On the use of international law in the interpretation of domestic law, see Stéphane Beaulac, *Recent Developments on the Role of International Law in Canadian Statutory Interpretation*, 25 STAT. L. REV. 19 (2004).

The Supreme Court also recently considered the legality of secondary picketing under common law, a dimension of labor law that we have not addressed up to now. Historically, courts developed numerous torts to restrict picketing activity and were particularly hostile to secondary action. Indeed, in the early 1960s the Ontario Court of Appeal famously found that secondary picketing was *per se* tortious.[109] Since 1982 unions have challenged a number of restrictions on picketing, claiming they violate freedom of expression, but they enountered two major problems. First, in most Canadian jurisdictions picketing is governed by common law, not statute, and this raised the question of whether the Charter applied to private litigation based on the common law. The court answered this question in the negative, although it did allow that the common law should be developed in a manner that was consistent with Charter principles.[110] The second problem was that where the Charter applied because there was state action, the court upheld restrictions on constitutionally protected picketing because they were demonstrably justified in a free and democratic society.[111]

The Supreme Court abruptly reversed its course in a unanimous judgment in *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,*[112] in which the court held that secondary picketing is legal at common law unless it involves conduct that is independently tortious or criminal. This was the first time that the Court modified the common law in order to make it conform to Charter values. Moreover, in reaching its decision, the Court expressed a far more positive view of the expressive value of picketing than it had in the past. While this decision still leaves in place all the classic economic torts (e.g., inducing breach of contract and civil conspiracy to injure) that provide a basis for limiting secondary activity, it indicates some willingness to use constitutional norms to expand the scope of legally permissible collective action.[113]

The third case raised a question about the constitutionality of union security provisions, particularly whether mandatory union membership violated freedom of association. The claim hinges on a finding that freedom of association also protects individuals from forced association and that various forms of union security bring

109. Hersees of Woodstock Ltd. v. Goldstein, [1963] 2 O.R. 81.
110. RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.
111. H.J. Glasbeek, *Contempt for Workers*, 28 OSGOODE HALL L.J. 1 (1990).
112. RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156.
113. For discussion, see Bernie Adell, *Secondary Picketing after* Pepsi-Cola*: What's Clear, and What Isn't*, 10 CAN. LAB. & EMP. L.J. 135 (2003).

people into involuntary association. The court has been badly split on these issues and this was evident in its most recent decision, *R. v. Advance Cutting & Coring*, which produced five separate judgments.[114] A large majority of the court endorsed the proposition that freedom of association encompasses a negative right from forced association, but only a bare majority found that a mandatory membership provision in a Quebec construction industry collective bargaining violated that guarantee. In the majority's view, compulsory membership in a union amounted to a form of ideological coercion, even in the absence of any evidence that the union imposed its views on its members. In the result, however, a bare majority of the justices upheld the law: one judge rejected negative freedom of association; three rejected the claim that compulsory union membership violated the negative right; and one held the violation was demonstrably justified because of the severity of the labor relations problems in the Quebec construction industry. Thus, while this particular law survived, the court's decision provides ammunition for future challenges to union security clauses and the use of union dues for political activity.[115]

In sum, law has operated, in a limited way, to constrain downward pressure on collective bargaining schemes. While international law does not impose any enforceable limits on state action, its norms have influenced the Supreme Court of Canada's interpretation of domestic constitutional law and led the court to strike down the PC legislation depriving agricultural workers any protection or support for associational activities. The court has also used Charter values to loosen common law restrictions on secondary action. Law, however, can also be used to limit collective bargaining schemes, as evidenced by the courts' concern to protect individuals against compelled associations.

iii. Ideology/Civil Society

An assessment of the extent to which popular beliefs and civil society activism constrains Canadian governments from deregulating labor markets generally and weakening collective bargaining regimes in particular is inherently difficult. In part, the election of social democratic governments in a number of provinces speaks to the level

114. R. v. Advance Cutting & Coring, [2001] 3 S.C.R. 209.

115. Michael MacNeil, *Unions and the* Charter*: The Supreme Court of Canada and Democratic Values*, 10 CAN. LAB. & EMP. L.J. 3 (2003).

of popular discontent with the social dislocations and growing inequality that are associated with the combination of trade liberalization and neo-liberal domestic politics, but our focus here is on the extra-parliamentary activities of labor and social movements, particularly as they relate to the collective bargaining regime.

At a national and provincial level, regressive labor legislation has often been met by large mobilizations of unions and social movements. In Ontario, for example, the labor movement launched a series of one-day municipal-wide general strikes in response to the PC government's labor law reforms. Social movements joined the cause, bringing in their concerns about other government policies, producing unprecedented displays of solidarity. In Toronto, nearly a million people took to the streets. Yet the movement fizzled, in part because of internal tensions between public and private sector unions.[116] In subsequent years two massive public sector strikes, one a legal strike by provincial government employees, the other an illegal province-wide strike by Ontario teachers opposed to legislation that, *inter alia*, weakened their collective bargaining rights, also attracted widespread public support, but did little to deter the government from pursuing its agenda, although it may have moderated the use of legal coercion against the strikers.[117]

Trade liberalization and the growing economic integration of Canada, the United States, and Mexico has encouraged the development of transnational union and social movement activism. For example, it has been suggested that the greatest contribution of the NAALC complaint process is not the case results, but the deepening of ties between national labor movements.[118] Yet despite the growth of this activism, it would be difficult to argue that it has constrained the Canadian state, in part because activists have not targeted Canada. Rather, transnational activism has aimed at labor market regulation and enforcement in Mexico and other less developed countries, the overseas labor practices of multinational corporations and their contractors, and developments in the laws and institutions governing international trade. To the extent that cross-border resistance is successful, it relieves some of the pressures that

116. Marcella Munro, *Comment on Ontario's Days of Action and Strategic Choices for the Left in Canada*, 53 STUD. POL. ECON. 125 (1997).

117. DAVID RAPAPORT, NO JUSTICE, NO PEACE: THE 1996 OPSEU STRIKE AGAINST THE HARRIS GOVERNMENT (1999); Harry Glasbeek, *Class Wars: Ontario Teachers and the Courts*, 37 OSGOODE HALL L.J. 813 (1999).

118. Ayres, *supra* note 54, at 110.

may otherwise promote Canadian labor market deregulation, but its effects are quite indirect.

3. Conclusion

The emerging consensus that the trajectory of Canadian labor law has not changed for the worse during the free-trade era fails to give adequate weight to the negative effects of the move from card-count certifications to elections that has occurred in many private-sector collective bargaining statutes. It is arguable that the negative effect of this change on trade union density outweighs the positive effects of more union friendly amendments. The trajectory looks even worse if we include public sector collective bargaining legislation, as Canadian governments have increasingly limited the collective bargaining rights of public and para-public sector employees. Finally, an even more negative assessment is reached if we focus on regulatory effectiveness. Trade liberalization has contributed to the rapid restructuring of the Canadian labor market over the past fifteen years, but collective bargaining law has not been adapted to this new reality. The result is a growing mismatch between the legal regime and the world in which it operates.

Yet, it is also the case that the downward trajectory of the collective bargaining regime has not been as steep as many free-trade critics predicted. This is because of internal accommodations and external restraints. Internal accommodation is built into free collective bargaining, which is designed to be responsive to changes in bargaining power. The role of collective bargaining as promoter of industrial democracy has diminished, leaving it as just one mechanism among others for establishing terms and conditions of employment. At the same time, union bargaining power has declined, so that unionized employers have been able to implement flexibilization and cost-cutting strategies, albeit not without resistance. For those who view collective bargaining as a mechanism for protecting labor standards this is not good news, but it does help explain why the pressure for legal deregulation may have been blunted. Indeed, it is arguable that because market discipline does not operate as effectively on the public sector governments have been more inclined to use legislation to achieve their objectives. External influences, however, have exerted some moderating pressure. In particular, there is considerable political support for parties that articulate an alternative to the neo-liberal vision of a world governed by market forces. Where left-center parties are elected, the private sector

collective bargaining regime has been sustained and there is somewhat less frequent resort to coercive legislation in the public sector. International and domestic constitutional law have exerted a weak, but moderating, effect most clearly exhibited in the *Dunmore* decision imposing a positive obligation on the state to protect the exercise of freedom of association for vulnerable workers. Finally, while there have been major civil society mobilizations to oppose trade liberalization and sporadic mass demonstrations against anti-union labor legislation, their restraining effect has been limited.

B. United States

1. Trajectory of Labor Market Regulation

a. Legislative Change

i. Private Sector Collective Bargaining

The most notable characteristic of American private collective bargaining legislation is that it has not changed in any major respect since at least 1959 and that its basic text dates from 1935 and 1947. Legislative inaction is not the result of a lack of effort, largely on the part of unions, to amend the law. Rather, it is primarily caused by organized employers mobilizing enough support in Congress to block any amendment proposed by labor.[119] Clearly, employer opposition to union-sponsored labor law reform predates NAFTA, so it cannot be said that legislative inertia is one of NAFTA's effects, although it is fair to surmise that in the post-NAFTA environment employers' resolve to resist labor law reforms, such as a prohibition on the permanent replacement of striking workers, has only been strengthened.[120] Therefore, an assessment of NAFTA's impact on private sector collective bargaining must shift to passive and judicial/administrative forms of deregulation.

ii. Public Sector Collective Bargaining

Jurisdictional arrangements over public sector bargaining in the United States are extremely decentralized. As a result, collective bargaining rights are "a crazy-quilt patchwork of state and local laws,

119. Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

120. Two bills containing this prohibition gained majority support in Congress in 1992 and 1994, but in each case were filibustered in the Senate. *Id.* at 1541.

regulations, executive orders, court decisions, and attorney general opinions."[121] Like in Canada, public sector collective bargaining laws were first passed in the 1960s and were adapted from the private sector model, subject to a variety of limitations regarding the scope of bargaining and methods of dispute resolution. Unionization in the public sector spread rapidly, even as private sector density fell.

Because of its decentralized character, public sector labor law is much more responsive to changes in the political orientation of the government in power than private sector legislation. As a result, changes in public sector labor law have been diverse, making it difficult to identify an overall trend. Belman et al., argue that public sector collective bargaining has moved from a period of maturation to one of transition, and that its future direction will be shaped by two competing strategies, one involving a best practices approach, the other cost-cutting and downsizing.[122] In the former scenario, public sector collective bargaining may fare well, while in the later it is likely to be restrained.

Federal government labor law provides a good example of how shifting political fortunes influence the direction of change. The Clinton administration issued Executive Order 12871 in 1993. It aimed to improve government efficiency through partnership arrangements with its unionized employees. Under this regime, union membership and density increased in the federal public service. The Bush administration was opposed to working with unions and repealed EO 12871. As well, his administration sought and gained the power to exclude unions from agencies handling public security issues. As a result, federal sector union density has been declining.[123]

At the state level, the picture is quite mixed. As of 2002 there were twenty-seven states that did not have public sector collective bargaining laws, although provision existed in some of those states for collective bargaining under local ordinances or executive orders. This is largely unchanged from the situation in 1987.[124] Collective bargaining rights were extended to public sector workers in a number

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121. John Lund & Cheryl Maranto, *Public Sector Labor Law: An Update*, *in* PUBLIC SECTOR EMPLOYMENT IN A TIME OF TRANSITION 21, 21 (Dale Belman et al. eds., 1996). *See also* James T. Bennett & Marick F. Masters, *The Future of Public Sector Labor-Management Relations*, 24 J. LAB. RES. 533, 533–35 (2003).

122. Belman, Gunderson & Hyatt, *supra* note 33, at 2.

123. Robert Tobias, *The Future of Federal Government Labor Relations and the Mutual Interests of Congress, the Administration, and Unions*, 25 J. LAB. RES. 19 (2004).

124. Joyce M. Najita & James L. Stern, *Introduction and Overview*, *in* COLLECTIVE BARGAINING IN THE PUBLIC SECTOR: THE EXPERIENCE OF EIGHT STATES 3, 5 (Joyce M. Najita & James L. Stern eds., 2001); Steven Kreisberg, *The Future of Public Sector Unionism in the United States*, 25 J. LAB. RES. 223, 226–27 (2004).

of states by executive order (e.g., Maryland and Kentucky), but in at least one state, Indiana, the public sector collective bargaining scheme was terminated by executive order.[125] Belman et al. conclude that "the pronounced trend since 1987 has been toward circumscription of bargaining and toward support for unilateral action by government"[126] but it would appear that post-NAFTA retrenchment in the United States is not as severe as it has been in Canada.

b. Passive and Administrative/Judicial Deregulation

The real story of private sector American labor law is not that it has been stripped down by legislative change (at least not since 1959), but rather that it has become ineffective in promoting collective bargaining or even in protecting basic worker rights to freedom of association. The process of erosion, however, was already well advanced long before NAFTA. Private sector union density hovered around the 30% range until about 1970, when it began dropping sharply. By the beginning of the free-trade era it had dropped to around 13% and has since fallen below 9%.[127]

There is a great debate over the causes of this decline and whether and to what extent it is attributable to the deficiencies of collective bargaining law itself, its interpretation, and its administration, particularly in the face of growing employer resistance to unionization. It is beyond the scope of this article to review that literature, but there seems to be fairly compelling evidence that law does matter and that its failings explain some significant part of the decline of private sector unions.[128] In particular, the U.S. system of drawn-out certification elections and the lack of adequate protection against unfair labor practices have been noted as major impediments to successful organizing drives in the face of employer hostility, while the grant of legal authority to employers to hire permanent strike replacements and the restriction on unions engaging in secondary action have been identified as major causes of weakened union bargaining power.[129] These shortcomings are, in part, embedded in

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125. Kreisberg, *supra* note 124, at 223–25; Kevin Corcoran & Mary Beth Schneider, *Governor says no to bargaining*, Jan. 11, 2005, INDIANAPOLIS STAR (ONLINE).

126. Belman, Gunderson & Hyatt, *supra* note 33, at 10.

127. Goddard, *supra* note 76, at 465; U.S. Census Bureau, *supra* note 34, at tbl. 638.

128. For a useful overview, see Bruce Nissen, *The Recent Past and Near Future of Private Sector Unionism in the U.S.: An Appraisal*, 24 J. LAB. RES. 323, 323–28 (2003).

129. Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 99 HARV. L. REV. 351, 412–19 (1984); Risa

the statute's text, but are also the product of decades of administrative and judicial decision-making.[130] The NLRB has become far more politicized than Canadian labor relations boards and thus there are much greater shifts in decision-making when a new administration takes office. For example, the current Bush board has been accused of exhibiting a strong employer bias in recent decisions that have, *inter alia*, overruled Clinton board decisions that facilitated bargaining by graduate teaching assistants and contingent workers.[131] On the judicial front, the United States Supreme Court has for many years given priority to individual rights over the promotion and preservation of collective bargaining relationships.[132] For all these reasons, the general picture is one of a regime that has become sclerotic through a combination of statutory gridlock, the weight of past decisions, and judicial constraints.[133]

If American labor law was already ineffective at the beginning of the free-trade era, changes in the labor market since then have only exacerbated the problem. Much of the success of the U.S. labor movement was premised on its ability to take wages out of competition. As free trade agreements unleash competitive forces, and governments deregulate sectors of the economy, like interstate trucking and airlines, unions can no longer sustain that position.[134] Stone notes, "As firms find themselves in a more competitive environment through increased trade and global competition, they have to pay more attention to short-term cost reduction."[135] For non-union firms, union avoidance looms as an even higher priority than it did previously. According to a study of union certification campaigns

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Lieberwitz, *Labor Law in the United States: The Continuing Need for Reform*, 46 MANAGERIAL L. 53 (2004); FANTASIA & VOSS, *supra* note 27, at 63–77.

130. JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947-1994 (1995); Estlund, *supra* note 119, at 1558–69.

131. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361 (2000); GROSS, *supra* note 130; Steven Greenhouse, *Labor Board Detractors See Bias Against Workers*, N.Y. TIMES, Jan. 2, 2005, at 12.

132. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004); James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939 (1996); Ellen J. Dannin & Terry H. Wagar, *Lawless Law? The Subversion of the National Labor Relations Act*, 34 LOY. L.A. L. REV. 197 (2000) (focusing on the deleterious effect of the court-developed doctrine that allows employers to implement final offers on reaching an impasse on collective bargaining relations).

133. Estlund, *supra* note 119, 1558–69.

134. Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 12–15 (1993).

135. STONE, *supra* note 38, at 86. *See also* Joel Cutcher-Gershfeld & Thomas Kochan, *Taking Stock: Collective Bargaining at the Turn of the Century*, 58 INDUS. & LAB. REL. REV. 3, 20 (2004) (international competition and pressure for flexibility are important drivers of systemic work practice changes); Rose & Chaison, *supra* note 39, at 47–49.

in 1998 and 1999, more than half the targeted employers threatened to move or shut-down operations in response to union activity.[136] Growing competitive pressure has also promoted reliance on flexibilization strategies, including outsourcing and the growth of contingent and precarious employment,[137] all of which undermine the effectiveness of collective bargaining law that was constructed on the norm of the standard employment relation that offered workers long-term, reasonably secure employment with a large employer. The new labor market places enormous demands on unions to continuously organize new and small bargaining units, often populated by contingent workers whose employment status may be uncertain, and to negotiate collective agreements with small firms operating in highly competitive environments.[138] Thus, although a number of scholars argue that trade liberalization is not a major direct cause of deunionization, many agree that its indirect effects are significant.[139]

In short, it is hardly a cause for celebration to say that the rights of U.S. workers under its private sector collective bargaining laws have not been eroded by legislative change during the free-trade era. The effectiveness of U.S. labor law was already close to the proverbial bottom prior to the free-trade era, so it is not surprising that employers have not pursued labor law reform as a means of adjustment to the pressures of globalization. Rather, their lobbying energies have been directed at blocking union-sponsored labor law reforms to remedy the scheme's well-documented deficiencies in today's labor market. The growing mismatch between the legal regime and the world of work that it is intended to regulate justifies characterizing what has happened as a case of passive and administrative deregulation *par excellence.*

2. Contextual Mediations

a. Bargaining

While it has been argued that the Wagner Act was conceived as an ambitious attempt to construct a more democratic and cooperative

136. Bronfenbrenner, *supra* note 17.

137. PAUL OSTERMAN ET AL., WORKING IN AMERICA 33–44 (2001); LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2002/2003, 250–62 (2003) (serious employment declined from 1995–2000 but is increasing in current labor market recession).

138. STONE, *supra* note 38, at 67–86, 196–216.

139. ROBERT E. BALDWIN, THE DECLINE OF US LABOR UNIONS AND THE ROLE OF TRADE (Institute for International Economics, June 2003) (small portion of union decline due to trade-induced sector shifts); Nissen, *supra* note 128, at 326 (globalization negatively affects social regulation).

workplace, there is little dispute that, at best, American collective bargaining has become a vehicle through which unions and employers negotiate work rules, wages, and benefits. This occurred well before the free trade era, so our focus here will be on collective bargaining outcomes.[140]

As in Canada, a number of indicators suggest that unionized employers are extracting concessions through the collective bargaining process. On the economic front, the wage differential between unionized and non-unionized employees has narrowed: from 1991 to 2000 the wages of non-union workers increased faster than those of unionized workers.[141] As well, the linkage between productivity gains and union wage increases has been broken as capital is extracting a larger share of productivity growth.[142] Employers have also successfully pursued flexibilization strategies. According to one survey, in 1999 new work flexibility arrangements were achieved in one-third to one-half of negotiations, while new job security provisions were made in one-tenth to one-quarter of collective agreements. Even more troubling was that less than ten percent of respondents reported that they had somewhat or very cooperative relations and that their relationship was improving.[143] The picture that emerges from this study is that, while innovative contract language is being negotiated, it results from management forcing its agenda onto the union without providing workers with the job security or wage increases they seek. The capacity of unions to resist these concessions is diminished, as evidenced in the decreasing frequency of work stoppages: in 1989 there were 51 strikes idling 1,000 or more workers, but only 15 strikes idling 1,000 or more workers in 2004.[144] The result is adjustment, but of an imbalanced, not a progressive, kind; more the product of changing power relations than the negotiation of mutual gains along the high road.

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140. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379 (1993) (arguing Senator Wagner sought to construct a cooperative social democracy); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (arguing that Act created a bare legal framework to facilitate private ordering by management and labor); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978) (Act's transformative potential defeated).

141. Ann C. Foster, *Differences in Union and Nonunion Earnings in Blue-collar and Service Occupations* (U.S. Dep't. of Labor, Bureau of Labor Statistics, June 25, 2003), *available at* http://www.bls.gov/opub/cwc/cm20030623ar01p1.htm.

142. MISHEL ET AL., *supra* note 137, at 86–94, 156–58.

143. Cutcher-Gershenfeld & Kochan, *supra* note 135, at 9–10, 22.

144. Department of Labor, Bureau of Labor Statistics, Series WSU 100.

b. External Constraints

i. Political Constraints

Given the ineffectiveness of the current private sector collective bargaining scheme, the political problem in the United States has not been to block legislative deregulation, but to enact reforms to reverse its downward trajectory. This has been beyond the means of the American labor movement. Because labor law is federal, political influence in particular states is not sufficient to produce legislative change. As well, in the absence of a social-democratic party, the U.S. labor movement has traditionally channeled its political energies into support for the Democratic Party. Yet even during Democratic administrations, the labor movement has been unable to get any part of its collective bargaining reform agenda passed in the face of vigorous employer opposition, and there is little prospect in the foreseeable future that this will change.[145]

ii. Legal

International law has had even less influence in the United States than in Canada. Although the United States has not ratified either of the ILO's core conventions respecting freedom of association (Conventions 87 and 98), it supported the ILO *Declaration of Fundamental Principles and Rights at Work*, which includes freedom of association. As well, member countries are bound to respect the principles of Conventions 87 and 98 even if they have not ratified them and the United States has accepted the jurisdiction of the ILO Committee on Freedom of Association (CFA) to review complaints filed against it.

Like Canada, while the United States accepts these international rights in principle, it feels free to depart from them in practice. In 1990 the CFA upheld two complaints against the United States, one challenging the right of employers to hire permanent replacements for striking workers and the other challenging state laws prohibiting public sector unionization and collective bargaining. The government took no action to bring its laws into compliance with ILO standards.[146] This seemed to discourage further complaints, although recently there

145. Estlund, *supra* note 119, at 1540–45.

146. Lance Compa, *Workers Freedom of Association in the United States: The Gap between Ideals and Practice*, *in* WORKERS' RIGHTS AS HUMAN RIGHTS 23, 28–30 (James A. Gross ed., 2003); Burkett et al., *supra* note 99, at 260–64. For a more positive assessment, see Anthony G. Freeman, *ILO Labor Standards and U.S. Compliance*, 3 PERSPECTIVES ON WORK 28 (1999).

has been renewed interest in the process. Since 1999 four complaints have been filed, two of which were subsequently withdrawn and one which is still pending. The other complaint concerned the U.S. Supreme Court decision in *Hoffman Plastics*, which held that undocumented workers who are illegally dismissed for union organizing activities are not entitled to back pay for lost wages. The CFA ruled that the decision violates international law protecting workers' freedom of association and invited the U.S. government to explore all possible solutions, including amending the legislation, in full consultation with the social partners concerned. The U.S. government, however, has not taken up the CFA's invitation and in a recent follow up the CFA regretted that the government has not provided any information on measures taken to explore possible solutions, thus continuing its pattern of neglecting ILO norms.[147]

The NAALC has also had little impact on American labor law. To date, 9 complaints have been filed against the United States, 7 with the Mexican NAO, and 2 with the Canadian. Seven of these related to freedom of association. The first was launched in 1995 and involved the closure of a Sprint plant, allegedly to avoid unionization. Ministerial consultations produced an agreement to keep the Mexican Secretary of Labor informed of the legal proceedings underway in the United States, to instruct the NAALC secretariat to study the effects of sudden plant closures on freedom of association, and to hold a public forum in San Francisco, the site of the closure. In December 1996, the NLRB ruled that the plant closing was motivated by anti-union animus, but the United States Court of Appeal overturned decision in November 1997. The NAALC secretariat's report, issued in April 1997, found that threats of plant closing to resist union organizing efforts were widespread in the United States but less prevalent in Canada and Mexico.[148]

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147. Commission on Freedom of Association, ILO, Cases 2026, 2227, 2292 and 2309; Hoffman Plastic Compounds Inc. v. National Labor Relations Board, 535 U.S. 137 (2002); Commission on Freedom of Association, ILO, CFA Report No. 332 (Vol. LXXXVI, Nov. 2003, Series B, No. 3) and Report No. 335 (Vol. LXXXVII, 2004, Series B, No. 3). For a recent report on the negative impact of the *Hoffman* ruling, see Human Rights Watch, *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants, available at* http://www.hrw.org/reports/2005/usa0105.

148. Mexico NAO Submission 9501 (Sprint); Mazuyer, *supra* note 21, at 251; Secretariat of the Commission for Labor Cooperation, *Plant Closings and Labor Rights* (1997), *available at* http://www.naalc.org/English/study7.shtml; Lance Compa, *NAFTA's Labour Side Agreement Five Years On: Progess and Prospects for the NAALC*, 7 CAN. LAB. & EMP. L.J. 1, 17–19 (1999); Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement* 40 (New York: Vol. 13, No. 2 (B), Apr. 2001).

Three complaints were filed in 1998 that raised freedom of association issues.[149] All three were resolved by the signing of a ministerial agreement that included an undertaking to hold a government-to-government meeting to discuss the application of U.S. law in the areas raised by the submission. As well, public outreach and education sessions were organized in two of the localities where the alleged violations occurred to inform the public of the workers' legal rights. In 1999 the Canadian NAO declined to accept a submission made by the Labor Policy Association, an advocacy organization representing major U.S. corporations, alleging that the NLRB's interpretation of the law prohibiting employer interference with trade unions interfered with employee involvement programs, thereby violating workers' freedom of association. Finally, in 2003, the Mexican NAO accepted a submission regarding the non-immigrant visa work program and has requested cooperative consultations with the U.S. NAO.[150]

The results of the complaints process have been disappointing, to say the least. As one commentator noted, "up to now all cases have ended with ministerial consultations and the joint agreement of action programmes that have not produced visible changes in the legal practices of the countries concerned."[151] In part this is a function of the NAALC's design, since complaints about freedom of association, collective bargaining, and the right to strike cannot go past the first stage of ministerial consultations. The result is that disputes are resolved at the political level in a context in which no government has an interest in pursuing high intensity conflict strategies.[152] Not surprisingly, activists are losing interest in using the NAALC and few new submissions are being filed.

This still leaves open the possibility that international labor and human rights norms exert an indirect influence through domestic constitutional and common law, as we saw in Canada. This has not been the case in the United States. The U.S. constitution does not protect freedom of association as such, and so attempts to constitutionalize labor rights have had to rely on other protected rights. None of these have been successful. Indeed, opponents of

149. Mexico NAO Submission 9801 (SOLEC); Mexico NAO Submission 9802 (Washington Apple Growers); Mexico NAO Submission 9803 (DeCoster Egg).

150. Canada NAO Submission 99-1 (LPA); Mexico NAO Submission 2003-1 (North Carolina). The background to the latter submission is discussed in Compa, *supra* note 146, at 47–48.

151. Dombois, Hornberger & Winter, *supra* note 20, at 430. For similar conclusions, see also Human Rights Watch, *supra* note 148; Andrias, *supra* note 20; Summers, *supra* note 21.

152. Dombois, Hornberger & Winter, *supra* note 20, at 430–35.

collective labor rights have had more success invoking constitutional protection for the right of individuals to refrain from compelled association.[153] As well, international labor and human rights norms have not influenced the courts' constitutional interpretations in this area, although a majority of the Supreme Court has considered international law norms in its assessment of cruel and unusual punishment.[154] Still, there is little likelihood that in the near future the U.S. Supreme Court will exercise its powers of constitutional or statutory interpretation, or develop the common law, in ways that will better protect workers' freedom of association.

iii. Civil Society Constraints

As noted, it is inherently difficult to assess the extent to which popular beliefs and social movement activism constrain government action. The U.S. labor movement, in coalition with other social movements, has scored some successes in opposing the free-trade agenda. It was largely responsible for creating a political environment in which then-candidate Clinton felt constrained to make his support for NAFTA conditional on the negotiation of a side accord protecting labor and the environment. As well, in the fall of 1997 and in 1998, the labor movement successfully lobbied to block the grant of fast-track trade negotiation authority to Clinton.[155] The labor movement also played a key role in organizing the protests at the WTO meetings in Seattle. Its influence, however, has weakened. In 2000 the House approved a trade deal with China and in 2002 legislation was passed that included trade promotion authority allowing the president to negotiate trade agreements that Congress must vote up or down without amendment. Labor and environmental issues can be addressed in those trade agreements, but in the most recent agreements this has taken the form of NAALC-type provisions that express a commitment in principle to core labor standards, but only require each party to enforce its existing laws while excusing weaknesses due to reasonable exercises of discretionary power and bona fide decisions regarding the allocation of resources.[156]

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153. Estlund, *supra* note 119, at 1579–87.

154. Most recently, see Roper v. Simmons, 125 S. Ct. 1183 (U.S. Mo. 2005). *See also* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 271, 257–58 (2001).

155. James Shoch, *Organized Labor versus Globalization*, *in* REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE TWENTY-FIRST CENTURY 275 (Lowell Turner et al. eds., 2001); Ayres, *supra* note 54, at 107–08.

156. Elliot, *supra* note 15; Summers, *supra* note 59.

While these efforts aim to protect American labor from "unfair" competition, they do not address directly the declining efficacy of the U.S. labor law regime. In large part, this is because the labor movement recognizes that domestic labor law reform is not achievable under current conditions. The American labor movement has recently split apart over the issue of how to reverse its declining fortunes, with one group emphasizing political lobbying and the other social movement unionism.[157] Social movement unionism, which emphasizes grassroots organizing and coalition building, has scored some notable successes, but it is not clear that either strategy will enable the labor movement to overcome the pressures undermining the efficacy of American labor law.[158] Transnational labor and social movement activism has increased, in part stimulated by the NAALC complaints mechanism. The U.S.-Mexican border has been the site of much of this activity.[159] Its primary focus, however, has been on Mexican labor practices. As well, transnational activism outside the NAFTA framework has also focused on labor practices in the undeveloped world. As a result, transnational civil society activism exerts little or no pressure on the U.S. government to address the erosion of its collective bargaining regime.

3. Conclusion

An assessment of the trajectory of U.S. collective bargaining law must start from the fact of its weakened state at the beginning of the free-trade era. Because it started closer to the bottom, it was less affected by competition than Canada, the jurisdiction with marginally higher labor standards. U.S. employers have not needed to make significant efforts to amend the NLRA in the free-trade era. This legislative stasis, however, does not establish that the collective bargaining regime's efficacy is unaffected by globalization. While U.S. collective bargaining law has not been racing downward, increased global competitiveness has changed the labor market in ways that are antithetical to its ability to promote collective bargaining and protect workers' freedom of association. The growing mismatch between law and the social reality in which it operates

157. Steven Greenhouse, *Labor Debates the Future of a Fractured Movement*, N.Y. TIMES, July 27, 2005, at A13.

158. FANTASIA & VOSS, *supra* note 27; HOYT N. WHEELER, THE FUTURE OF THE AMERICAN LABOR MOVEMENT (2002).

159. DAVID BACON, THE CHILDREN OF NAFTA: LABOR WARS ON THE U.S./MEXICO BORDER (2004).

produces greater regulatory failure. Public sector collective bargaining has also been adversely affected by the adoption of neo-liberal policies that are associated with the competitiveness agenda, but retrenchment does not seem to be as severe in the United States as it has been in Canada. The impact of liberalized trade on collective bargaining law, however, is mediated by internal and external factors. Internally, the collective bargaining process has accommodated employer-initiated demands for concessions and greater flexibility. Externally, political constraints have operated to prevent enactment of the remedial legislation required to slow or reverse its erosion through what can best be characterized as malign neglect. As well, international law has little or no influence on the direction of U.S. labor law, and there seems little prospect that courts will constitutionalize labor rights or otherwise protect them through their power to interpret statutes and develop the common law. Finally, civil society activism in the labor rights area is largely directed outward, rather than inward on domestic labor policy.

IV. CONCLUSION: HAVE GREAT EXPECTATIONS BEEN DEFEATED?

If the great expectation was that NAFTA would produce dramatic and significant legislative erosion of collective bargaining laws, then it is fair to say that expectation has been partially defeated. In the United States, the NLRA has not been amended during the free-trade era, and, to the extent that it is possible to discern a trend, public sector collective bargaining law has suffered relatively modest setbacks. The expectation of erosion was stronger for Canada, the jurisdiction with the higher labor standards, and while there has not been a race to the bottom in labor legislation, there has been deterioration. While private sector collective bargaining laws have been strengthened and weakened at different times and in different places, the most significant change has been the elimination of card-check certifications in many jurisdictions, including Ontario and British Columbia. As numerous studies have shown, this change is likely to have a significant and negative impact on trade union density. Moreover, if we expand our focus to include public sector collective bargaining, we find the level of legislative erosion even greater as the frequency with which Canadian governments override or reduce existing collective bargaining rights has increased in the past decade.

The extent of defeated expectations is even less if we shift our focus from legislation to regulatory effectiveness. U.S. collective bargaining law was notoriously ineffective going into the free-trade

era and has only become more so as trade-linked changes to the labor market have created an environment that is even more inimical to the creation and perpetuation of collective bargaining relationships. A similar situation prevails in Canada, although it is moderated somewhat by stronger and better-enforced labor rights.

The partial vindication of the predictions of Model 1 still leaves us with the need to explain why great expectations were partially defeated. The contextual variables introduced by Model 2 led to an examination of factors internal to the system of collective bargaining and ones external to it. Collective bargaining is itself a mechanism of adjustment that accommodates the parties' changing goals and objectives. In both Canada and the United States there is evidence that the regime is accommodating employer initiatives aimed at cutting labor costs and increasing productivity. While in some cases this results in labor-management cooperation and mutual gains, the evidence suggests that the more frequent from of accommodation involves labor concessions to management demands. While some might characterize this outcome as a regulatory failure, I have treated it as accommodation within the system on the ground that private sector collective bargaining regimes in both countries were intended to be responsive to changing economic and labor market conditions.

Differences between Canada and the United States are, perhaps, most marked in relation to the influence of external factors. Because labor law in Canada is provincial rather than national, it has been more sensitive to sub-national swings in political strength and hence labor law reform has been more volatile. Conservative governments have taken steps to "Americanize" labor laws, particularly in the important area of certification procedures, but NDP and most Liberal governments have resisted that pressure and, indeed, have often passed legislation that moderately strengthened the private sector collective bargaining regime. They have been less charitable in dealing with their own workers. In the United States, there is little prospect that in the foreseeable future labor will be able to muster political support for long-needed reforms.

International or transnational legal regimes are ineffective in directly countering downward pressure on collective bargaining law in both Canada and the United States. However, the Supreme Court of Canada has taken international law seriously and used it as a point of reference in its interpretation of Canadian constitutional law. Depending on how far they go, this approach could lead to a constitutionalization of some parts of the collective bargaining regime, possibly including the right to have effective access to a statutory

bargain collectively scheme. As well, the court recently identified trade unions as socially desirable institutions whose activities, like picketing, are worthy of constitutional protection. There is little prospect that American courts will protect labor rights to the same extent.

Finally, social movements in both countries have been active in opposing globalization and neo-liberal restructuring, although it is arguably the case that protest actions aimed at regressive private sector labor law reforms and interference with public sector workers' collective bargaining rights have been stronger in Canada than in the United States. Yet, social movement mobilizations or their threat do not seem to have had much effect on domestic collective bargaining policy. Social movements, however, have scored some success in getting social and labor issues onto the table in international trade talks and in pressuring transnational corporations to take some steps to monitor labor conditions in their overseas supply networks.

In sum, this study supports the view that free-trade agreements create conditioning frameworks that generate some downward economic and institutional pressures on the effectiveness of collective bargaining laws. These pressures will also operate in the collective bargaining process itself, often yielding poorer outcomes for unionized workers. More optimistically, our study shows there are avenues for resistance, notwithstanding the attempt through free trade agreements to impose market discipline on politics and law. In Canada, law has proven to be more resistant to those disciplinary forces than many would have anticipated, but it would be a dangerous strategy to rely exclusively on the vagaries of judicial decision-making to resist the growing commodification of labor. The task of successfully organizing political and social movement resistance, however, is a daunting one.